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BUSINESS LAW

A TEXT-BOOK FOR SCHOOLS AND COLLEGES

BY

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OF THE PHILADELPHIA BAR

LECTURER ON LAW IN THE UNIVERSITY OF
PENNSYLVANIA

WITH AN INTRODUCTION

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INTRODUCTION

THE STUDY OF COMMERCIAL LAW IN SCHOOL AND COLLEGE

THE selection of school and college studies is made from the double point of view of discipline and utility. The time-honored subjects of instruction have acquired a prestige for discipline of the mind which is not to be shaken, and when advocates of newer branches of study dwell upon the utility of such subjects, they are frequently met with distrust, which finds expression in the fear lest something of the discipline of the older studies be lacking in the new. Nor can it be doubted that the utility so frequently claimed for newer studies would be purchased at too high a price if clear training of the intellect, with breadth and readiness of mind, be sacrificed to gain it. These several propositions form the basis of the strife which in recent years has agitated educators, and which has flamed with peculiar violence about all proposals for a commercial education. It is not to stir the fires of controversy, or to balance the rival claims of conservatives and innovators, that we have repeated the watchwords of the contending parties, but rather to discover what light the discussion may throw upon the place and purpose of the study of commercial law in school and college.

The contrast of discipline and utility has sometimes been pushed so far that disputants seem to believe that disciplinary studies cannot be useful, nor useful studies disciplinary. A distinguished jurist is reported to have said that while in his younger days all cases appeared to him either white or black, to his maturer vision they seemed mostly gray. What is true of actions of law is true in large measure of other controversies. In education, discipline and information are not hostile, but complementary, they are two means of promoting mental growth, the problem which lies at the root of all serious educational effort. They may, indeed, be combined in unequal proportions in different branches of study, but so far from being mutually exclusive, they are generally found to be united. Among the studies which the demand for a practical, or rather a commercial, education

has introduced into schools and colleges, few present so happy a blending of discipline and information as that of the commercial law.

The study of the law disciplines the mind in precision of thought and statement, and in logical reasoning. Above all things, the law is precise. It abhors vagueness, and tolerates no looseness of thought. To gain precision of terms, it frequently adopts modes of speech which seem prolix and barbarous, and which have been the frequent butt of jest and ridicule. But even this legal phraseology, with which, moreover, an elementary study of the law has little to do, has its uses. Partly because of their long-continued use, and more especially because they have been frequently passed upon by the courts, words and phrases which provoke the merriment of the layman have acquired a definiteness of meaning which no new formulation could give.

It is the spirit of the law to be exact. It means exactly what it says, and, under the searching analysis of generations of judges, the phrases it employs have a precision of meaning which is often lacking in other sciences. The student has missed the point of his study if he does not catch this spirit of preciseness, and it is a lesson of first importance to the pupil. The faculty of clearly stating facts in terms which admit of no question is one of the preëminent marks of a trained mind. But this mental quality, like all others, must be trained to be perfected, and for such training the study of law can hardly be excelled. One need not be versed in all the refinements of legal knowledge to appreciate the truth of this statement. The understanding of the simple rules which govern the elementary principles of law requires and promotes a grasp of language and a comprehension of the exact purport of verbal statements, whose worth cannot be estimated.

With precision of statement, the study of the law promotes clearness of thought. Its principles are but few, while their applications are innumerable. To apply a general principle to a particular set of facts, or to contrast different sets of facts with the legal decisions upon them and thus evolve general principles of law, offers an excellent training in applied logic. As the student progresses, he becomes impressed with the reasonableness of the law as it unfolds before him in a clear, logical system. Many times have I been told by a student that a solution stated did not seem to him so much the law as it was common sense. Nor was the student wrong in his intuitions, for with the homely phrase "common sense" we are prone to designate what we deem perfect logic.

The student is helped and stimulated by finding so much that seems to him common sense embodied in the law. It strengthens his reasoning powers to find their conclusions thus confirmed, and stimulates them by directing his thoughts into new channels, and to new applications of what he has learned.

This is particularly true in the study of contracts, which forms so large a part of the commercial law. The student learns that it is the purpose of the law to carry out the clearly expressed intentions of the parties. But he finds that parties to a contract frequently fail to express their intentions in a clear and unequivocal fashion, and that rules of law grow up which have no other purpose than to establish normal rules of conduct. The law assumes that one man does as others do in like circumstances. Thus the inherent reasonableness of the law is impressed upon the student, and he is encouraged to test its rules by the dictates of what he calls common sense. If that fails to reach a given set of facts, he has arrived at a point where he can see clearly that in such case it is more important to have a rule than that the rule should be one way or the other. He then appreciates that there may be situations where the courts say thus and so is the law, and where legal writers flounder in their attempts to furnish an explanation.

So much for the disciplinary advantages of the study of the law, which, strong as they are, will doubtless appeal with greater force to the teacher than to the pupil. In pointing out the practical advantages of a study of the law, we need have no fear that the student will fail to grasp them. Whether or not he intends at some future day to practise the law as a profession, he will readily recognize that contracts, notes, sales, agency, partnership, and transportation concern everybody. He does not have to be told that all business rests upon contracts of various kinds, and he readily comprehends that some knowledge of the law is a valuable adjunct to any one who has business affairs. Indeed, if it is pointed out to him, he will be quick to grasp the fact that educated men of the world must of necessity have some knowledge of the familiar laws of business contracts. Without such knowledge, gained perhaps through a long period of business experience, they would be helpless in the transaction of their affairs.

This indicates the limits within which the study of the law can properly be introduced into schools and colleges. Instruction in law must here aim to give that knowledge of the law which forms a part of the mental equipment of the well-informed man of affairs. Beyond this it cannot go. Other ideals would defeat the purposes

of general instruction. To give the knowledge of the expert, or even to strive to do away with the necessity for expert advice, is not to be thought of. In short, the aim of this instruction should be to enable a man to know when he needs the services of a lawyer, rather than to encourage him in the belief that he can dispense with such services.

As a means of cultivating mental power and imparting the degree of information suggested, the study of the law has an appropriate place in schools and colleges. The experience of ten years strengthens the writer's conviction that the study is interesting to the pupil and helpful to him. Its extremely practical bearing on the affairs of everyday life affords a host of opportunities for those mutual discussions of teacher and pupil which are among the most fruitful experiences of the class room.

Speculation on education is prone to outrun its practice. It is not enough to decide that a subject is fitted for instruction. Before you can carry an ideal into practice, you must find the teacher, and before it becomes general, you must find the text-book which adapts the subject to the purposes of instruction. I believe that Mr. White has written such a book, and I congratulate him upon the service he has rendered to teachers. It has been my privilege to examine carefully the manuscript of this work, and to offer such suggestions as were dictated by ten years' experience in teaching the subject.

Mr. White has sought, above everything else, to give an orderly and logical presentation of the subject of commercial law. His work is designed as a text-book, and in no sense as a reference work. So far as possible, technical terms have been avoided, and, when necessary, have been explained. There has been no attempt to disguise the difficulties of the law, but every effort has been made to make them plain by lucid exposition and frequent illustration. Mr. White has cherished the idea that a book upon the law need be neither abstract nor disconnected. As a member of the Law Faculty of the University of Pennsylvania, it has been his duty to expound the law to students, and he has sought in this book to present in simple language the elements of the law in such a way that the subject gradually unfolds before the student, and leads him, step by step, in a natural, logical manner from one proposition to another. In this effort, he has been unusually successful, and this trait of the book will, I am confident, recommend it to teachers.

ROLAND P. FALKNER.

PREFACE

THE object of this book is to present the elementary principles of law relating to the more common business transactions, in a style so clear and free from technicality that they can be readily understood by persons unused to legal phraseology. Any school-boy can understand these principles if they are placed before him in simple English, freed from legal verbiage. The law of contracts has been said to be nothing more than the law of common sense. The same may be said of the law of sales and agency. The discussion of negotiable contracts, common carriers, and business associations involves the use of somewhat more technical language, but the fundamental principles of these also are neither difficult nor obscure. It is the hope of the author that the book will afford a knowledge of these subjects, thorough, if elementary, and that it will do it in such a way that the student may not feel that he is studying a mere compendium of information.

The first part of the book is devoted to a brief discussion of law in general, a study of how it originated, how it develops, and how it has been divided into its many ramifications. The other parts, in order, treat of the subjects mentioned above. They do not pretend to offer a complete technical knowledge of any subject, but it is believed that they cover the leading principles in a thorough and connected manner.

It has not been the aim of the writer to offer any new legal principles. The originality of the work consists only of its arrangement and the manner of treating its subject-matter. He has freely made use of standard text-books and collections of cases, in order to arrange the subject in the clearest possible manner, and to eliminate whatever might be omitted without detracting from the value of the work as a text-book. The more technical discussion

has been arranged in such a way that it may be studied or not, as the teacher sees fit, without destroying the continuity of the text. No cases have been cited, as the work is not intended for the use of lawyers.

If the book succeeds in giving a practical insight into one of the greatest of sciences, and in inspiring a love for it which shall lead to a deeper study, it will have accomplished its purpose.

The writer desires to acknowledge his indebtedness to Professor Roland P. Falkner for his invaluable suggestions and advice, and for his able criticism of the book in manuscript.

THOMAS RAEBURN WHITE.

PHILADELPHIA,
November, 1900.

SUGGESTIONS TO TEACHERS

PRIMARILY this work was prepared for use in schools and colleges. The subject of which it treats has therefore been arranged with a view to its being taught according to a definite plan.

The purpose of Part I. is to introduce the student to the field of legal learning—to show him how the law has been built up, and to give him some idea of its extent and its many subdivisions. Every class should of course read Part I.

Part II. leads to the distinctive branch of law which the book investigates—that treating more particularly of the dealings between man and man. Nearly all the subjects covered concern some phase of the law of contracts. The second part is intended to give the student a thorough knowledge of the meaning of a contract. It discusses, with some minuteness, its essential elements and its effect upon the parties bound under it. This part of the book is subdivided into sections. Sect. I., dealing with the “Formation of Contracts,” should be studied in its entirety.

In Chap. VI., Sect. I., we meet for the first time a paragraph which is marked with a letter (A) instead of a number. The purpose of thus designating certain paragraphs by letters is to indicate those which, in the opinion of the author, are either too technical for the more elementary students, or which may be omitted in the study of the subject without serious loss. It will be found that the omission of these paragraphs will not disturb the continuity of thought, as the same matter is, wherever necessary, briefly stated in a previous numbered paragraph. Such statements are brief and general, serving as an introduction to the more detailed examination in the lettered paragraphs, which may be read or omitted, as may seem preferable.

In Sects. II., III., IV., and V., of Part II., many lettered paragraphs will be found. In some cases, whole chapters, *vide* Chap. V., Sect. IV., consist wholly of such paragraphs. In such cases the entire chapter may be omitted. With very young classes, Sects. II., III., and IV. may be omitted altogether. Sect. V., however, should be given at least a brief study by all grades.

Part III., "Sales," will be easily understood by the pupil who has studied the numbered paragraphs in Part II. All that follows Part II. presupposes a study of these paragraphs, and is much briefer, inasmuch as a thorough knowledge of elementary principles is assumed to have been gained.

Part IV., "Negotiable Contracts," is one of the most important sections in the book, but, at the same time, one of the most difficult. The more elementary classes may do well to omit it, and study Parts V. and VI., "Contracts of Common Carriers" and "Agency," in order, as these are short and easy to understand. All classes, however, should, if possible, take "Negotiable Contracts" in its order, as it logically comes before the study of contracts of common carriers.

Part VII., "Business Associations," while it treats of a very interesting and important subject, is the most difficult part of the book. Only well-advanced classes should attempt to give it a thorough study.

In Parts IV. and VII. many lettered paragraphs will be found. If the class is fairly well advanced, and time will permit, it will be better to omit nothing. But if lack of time prevents a thorough study, or if the class has difficulty in mastering the principles presented, the instructor, by observing the lettered paragraphs, will know what may safely be omitted.

The division of the text into paragraphs was made with a view to assist the teacher in the assignment of lessons. The division into parts and chapters was made on the basis of logical sequence. In assigning lessons in the longer chapters (*e.g.*, in Chap. V., Sect. I. of Part II.), it will be well to note the natural divisions of the chapter (*e.g.*, in Chap. V., Mistake, Misrepresentation, Fraud, etc.).

PART I

INTRODUCTORY

CHAPTER I

THE GENERAL FIELD OF LAW

1. **Meaning of "Law"; Natural Laws.** — "Law," in its broadest signification, means, "a rule laid down or established." In one way or another the word necessarily becomes familiar to us all. Students of science are familiar with the rules or laws which govern the nature and growth of plants and animals; those who have studied chemistry know that certain combinations of elements always produce a given result; students of mechanics know that certain combinations of forces produce a force of definite magnitude and certain direction; they can calculate precisely, even the strain supportable by a given structure. Every schoolboy knows of the law of gravitation which governs the attractions of bodies for each other, and controls the movements of the sun and planets. All these are natural laws, and, incidentally, laws that are never broken. Men have spent their lives in investigating them, but it is beyond their power to alter them in the slightest degree.

2. Laws governing Human Action ; their Origin. —

When we turn to the laws which control human action, we are confronted by a very different situation. No absolute rules were laid down by the Creator of the Universe to govern the conduct of mankind. While plants conformed strictly to the laws governing their growth, and the lower animals followed the unerring instinct which is Nature's law for them, man, by virtue of his power to reason and to will, needed something more to regulate his actions. Primitive man, perhaps, had no more need of laws than other animals, but as his power to think developed, he realized that mere physical instinct was not a sufficient guidance for him. He began to appreciate the fact that his neighbor had rights as well as himself. He saw these rights often, almost continuously, in conflict with his own. He perceived that if he was not to live in continual physical warfare it was absolutely necessary that the rights of all be regulated. Otherwise, his lot would be merely that of the wild animal, which maintains its cave dwelling by physical prowess, and is compelled to abandon it when it becomes old and helpless. A little later, the conception of right and wrong furnished another reason for the establishment of law. "Might makes right" is not consistent with moral principle.

In order, therefore, to protect himself in the quiet enjoyment of his property and to satisfy his conscience, man was compelled to make laws to govern his own conduct. These have grown as the race has grown, and are continually being altered, and, inasmuch as man has the power to obey them or not as he chooses, a punishment, called a "sanction," has been annexed to the breach of human laws to insure individual obedience to them.

3. Classification of Laws. — In the beginning we have defined laws as “rules,” and we will divide these rules into two general classes: the laws of Physical Science, which are natural laws, and the laws of Human Action, which are laws created by man for his own protection, except in so far as religious writings are considered to be laws laid down by the Deity. The laws of Human Action again are divided into four general divisions: the Moral Law, the Divine or Revealed Law, International Law, and Municipal Law.

4. The Moral Law. — The moral law has never been very strictly defined, nor is it very clearly definable. It may be said to be a general feeling in the community, as an aggregate, as to what is right and what is wrong. The punishment annexed to it is the disapprobation which the community visits upon the individual who oversteps the bounds. It changes, at least in some particulars, with every decade, and differs in different sections of the world, though a few cardinal principles are the same everywhere.

5. The Divine, or Revealed Law. — The divine or revealed law consists of those commands laid upon men, as they believe, by divine beings. They are usually contained in some kind of religious writings; throughout Christendom they are found in the Scriptures. This law is astonishingly similar whether you find it in the Bible, in the Koran, or in the writings of Confucius or of Buddha. This is no doubt true because revelation is often supplemented by man's conception of what should be, or, in other words, by his conscience; and men's consciences, in the light of the education they have had, all have the same general tendency. The divine law has a double means of

enforcement. It offers the hope of a reward in the future existence for conformance with its injunctions, and threatens eternal punishment as its "sanction." While few people strictly conform to this law, it is safe to say that it has a greater influence upon the everyday life of mankind than any other, and should never be thought of inconsiderately.

6. International Law. — International law, in its general or public sense, consists of those rules or precedents or customs by which independent nations have agreed, either expressly or tacitly, to govern their dealings with each other. This law approaches very near to Darwin's law of the survival of the fittest, and sometimes seems to be subject to change without notice. There are, however, a great many rules, such as those relating to the safety of ambassadors, by which the conduct of nations is so far regulated that few would think of violating them. Only strictly independent nations are recognized by international law.

7. Municipal Law. — Municipal law, with which we are concerned in this work, consists of those rules by which the civil conduct of the citizens and residents of a nation is regulated. The word "municipal," as here used, means all laws which control the actions of the inhabitants of states or nations. It does not refer to city law alone. Notice that municipal law goes no further than to prescribe a rule of civil conduct, *i.e.* the state regulates the actions of its citizens only so far as they might interfere with the rights of other men. Unlike the moral and divine law, it exists solely for the protection of men against each other, and takes cognizance of actions only. When it has performed that function its work is done. A man may be as

wicked as he pleases, the municipal law will not interfere with him so long as he does not interfere with anybody else. Municipal law may be either written or unwritten.

8. Written Law. — Written or statutory law consists of positive enactments laid down by the legislating body of the state, as acts of Parliament in England, or acts passed by Congress, or by state legislatures, or by city councils. These acts are usually enacted to meet some need peculiar to the territory to which they apply. In some instances they are simply declaratory of known principles of law, and in others they are passed for the purpose of varying or contradicting such known principles. According to the ancient principles of unwritten law, a married woman could not hold personal property, or make contracts. Now, by statutes passed in most states of this country, her disability is removed, and she may act as freely in all legal matters as a single woman.

9. Unwritten Law; Civil Law. — Unwritten law, which is by far the most important body of law, is, so far as concerns English-speaking people, of two general divisions: the civil law and the English common law. The civil law forms the basis of all the continental European systems of jurisprudence, and has very largely affected English and American law. It consists of the laws promulgated by the Roman People from the time of the Tarquinian kings to the downfall of the Empire, including not only the edicts of the kings, senate, and emperors, but also legal decisions and opinions of learned writers bearing upon the same. This great body of laws was codified, *i.e.* was arranged, classified, and promulgated during the reign of the Emperor Jus-

tinian and by his orders. This was in the sixth century A.D. This compilation is known as the Justinian Code. A reformation of this code was made by Napoleon, and the Code Napoléon is used in France to-day. Various modifications of the latter code form a very important part of the law of those countries at that time under the sway of Napoleon, particularly Italy, Holland, Germany, and Spain. Napoleon's work as a law-maker may, to some extent, account for the dominance of military power in France, Napoleon himself being a thorough believer in the efficacy of military force, and a soldier rather than a statesman or a lawyer.

10. Importance of the Civil Law. — The study of the civil law is important to us because it has very materially affected our own law. When William the Conqueror took the English throne, in 1066 A.D., he carried with him not only the French language and French customs, but also, to a considerable extent, French laws. Moreover, some parts of our country, notably Louisiana, have been, and still are to a large degree, governed by French law rather than by the common law. All the territory which we formerly acquired from Spain, as well as our recent acquisitions, did and do contain the Spanish system of law, which of course is the civil law.

11. The Common Law of England; its Origin. — The common law of England, inherited by us from the mother country, is by far the most important to American students. It is indigenous to English soil and had its origin in custom or usage. In very ancient times, before there were any organized courts, and when, indeed, there was little attempt at administration of justice on the part of the ruling power, the dealings

of men with each other depended entirely upon custom. There was merely a general feeling that in a certain particular situation a certain line of conduct should be followed. If, in that situation, some individual acted otherwise than was customary, the disapprobation of the community was visited upon him.

In ancient times, in England, one man generally owned a very large tract of land upon which he had a great many tenants. It was the custom for a certain portion of this land to be set apart for a common pasturage for the cattle of all the tenants. Suppose, after several generations, the new owner of the land attempted to abolish this right of pasturage. He would meet with a great deal of opposition, even if there were no law to prevent him from doing as he chose. Once accepted as the guiding rule of men's actions, and after courts were established for the purpose of enforcing justice between individuals, these customs were recognized as binding laws. It then became necessary to discriminate between customs which had been in existence so long as to become laws, and customs which had not yet become firmly established, and therefore not binding upon any one. To make use of a quaint expression which we often find among old English writers, if a custom had existed "from a time whereof the memory of man runneth not to the contrary," it became a law. This meant that if in the memory of the oldest inhabitants there was no time when this custom had not been observed, it was deemed binding upon every one.

12. First Digest of Customs. — As may readily be surmised, these customs were binding only in the community in which they had been observed. A custom

might not extend over a whole kingdom, nor perhaps over a whole county, but might apply only to a certain neighborhood. The result of this was that a great number of customs, more or less conflicting with each other, grew up. This rendered the work of the judges doubly difficult, for they had to decide, first, whether the custom existed, and, secondly, whether it applied in the particular case before them. It will be remembered, from the study of English history, that at the time when King Egbert came to the throne of Kent the island was divided up into a number of small, but independent, kingdoms. The customs or usages in each one of these kingdoms necessarily differed, to quite a large extent, from each other. After King Egbert had, by many years of warfare, succeeded in uniting all England under one king, there was almost hopeless conflict of customs.

When Alfred the Great came to the throne, he found time among all his other labors to have the customs or laws of all England harmonized, as far as possible, digested, and arranged in a great book in such a way that they could be conveniently referred to. For this work King Alfred the Great was called "*Legum Conditor*"—founder of the law. For the first time the whole body of the common law of England really had a recognized existence, and so the digest of King Alfred is the fountain head of that great body of law which now exists.

13. How the Common Law has grown. — Since the time when King Alfred first gathered the laws together in one book, the common law has grown to its present vast proportions in the following way. Suppose a dispute arose between two individuals, whom we will

call A and B, in a court of law at that time. The judges, after examining the records of the law in King Alfred's book, and after listening carefully to the facts of the case, which perhaps were previously decided by a jury, rendered a decision as to which party was in the right. In giving this decision they would state, also, their reasons. Suppose, now, a dispute between C and D arose at some later period about the same point. The judges, after listening to the facts, would search the records and find the decision of the previous case between A and B. They would then decide the case between C and D in the same way. When other cases involving the same or very similar questions arose thereafter, they would be controlled by the decisions in the cases between A and B and C and D. A judge is not at liberty to ignore the decisions of the courts which have gone before him, for those decisions are a part of the common law, and "no man is wiser than the law." The countless decisions of courts in England and in all the states in this country, the records of which fill thousands of printed volumes, are binding upon courts which decide cases at this day. Each new decision becomes a part of the common law, and is itself a precedent.

Some writers declare that the common law itself has always existed, just as the law of gravitation has always existed, and all that judges do is to investigate what the law is and apply it to individual cases. Really, however, the common law is built of nothing but these same judicial decisions. Theoretically, the common law never changes any more than the law of gravitation changes. Really, it is changing every day. While, as we have indicated, the

decisions which have gone before are binding, yet as new situations arise, the varying conditions of the times appealing to the common sense of the judges, leads them, slowly, it is true, though surely, to mould the common law into conformity with the new conditions. If this were not so the common law could not have served the purpose which it has served in the history of the world. It continues to grow, and, gradually, with beautiful adaptability, changes to meet advancing needs.

14. Authority of Judicial Decisions not Absolute. — We do not mean to say that a judicial decision cannot be departed from under any circumstances. If a line of judicial decisions has decided a question in a particular way for a number of years, and public policy demands an absolute change, sometimes it is made by the courts of common law themselves. It is not often, however, that a common law court has the courage flatly to disregard foregoing decisions. The judges usually say that the remedy in such a case lies with the legislature. If the common law in some particular point is not consistent with the advancement of civilization, the legislature will step in and absolutely change it. Again, when we say that a judicial decision is a precedent, understood in this limited sense, we do not mean that it is binding upon all common law courts, wherever situated, but it is binding only upon the courts of the jurisdiction in which the decision was rendered. English decisions bind English courts; New York decisions bind New York courts, etc.

There are in every state courts of first resort and courts of final resort. If A and B have a lawsuit, their case is first decided in a court of first resort.

These courts have different names in various states. Sometimes they are called Common Pleas Courts, sometimes Circuit Courts, sometimes they go by other names. If one of the parties to a lawsuit is dissatisfied with the decision or verdict in the court of first resort, he may appeal to the court of final resort. This is usually called the Supreme Court of the state. A decision when rendered there is final, unless there is a constitutional question involved, which will warrant taking the case to the Supreme Court of the United States. The decision there is absolutely final, and if it is in conflict with the decision of the state Supreme Court or with that of a court of first resort, the decision of the Supreme Court of the United States will, of course, prevail.

CHAPTER II

DIVISIONS OF MUNICIPAL LAW

1. Classification of Municipal Law with Respect to its Objects. — Now, having seen, to some extent, how the law is formed, we will devote our attention to an investigation of its objects. These are twofold: the protection of the rights of individuals, and redress for wrongs which have been inflicted upon them. Therefore, if we classify the law with respect to its objects, we may distinguish two general divisions: First, that law which defines the rights which men possess and explains what constitutes infringement upon those rights, which we call “Substantive Law”; Second, that law which furnishes the machinery by which criminals are punished, and wrongs redressed, and which we call “Remedial Law.”

2. Substantive Law; Rights of Persons. — In discussing substantive law we will consider it in two divisions. The first relates to “Rights” and the second relates to “Wrongs.” By “Rights,” in this sense, we mean legal rights, rights which the law recognizes and will protect; and by “Wrongs” we mean wrongs which are recognized to be such by the law and for which the law offers a redress. Following the classification used by Blackstone, Rights may be subdivided into the “Rights of Persons” and the “Rights of Things.” The “Rights of Persons” is that branch

of substantive law which deals with the rights which are annexed to the persons of men, as distinguished from those which affect property alone. These include the rights which every man has to enjoy personal security, personal liberty, and private property. It also defines the various rights and liabilities arising from the relation of Master and Servant, Husband and Wife, Guardian and Ward, Parent and Child, etc. This branch of law deals not only with individual persons, but with the liabilities and privileges of corporations as well.

3. The Rights of Things. — The “Rights of Things” is that branch of substantive law which deals with the acquisition and ownership of real and personal property, together with the annexed rights and liabilities. The subjects treated in this book belong, for the most part, to this division of substantive law.

4. Public Wrongs. — Wrongs, which you will remember as the second general division of substantive law, are of two kinds: public wrongs and private wrongs. Public wrongs are those committed against the whole community, as distinguished from wrongs which harm only certain individuals. Of such a nature is any act which disturbs the peace of the commonwealth or is a menace to the security and general welfare of the people at large. All such acts are called crimes or misdemeanors, according to the magnitude of the offence, and are punished by public authority.

5. Private Wrongs. — Private wrongs are not of themselves dangerous to the community, but inflict loss upon one or more individuals. They are known as torts. Among the most common of such wrongs are cases where one person injures another by means of

some careless or negligent action. The one who commits a private wrong must make restitution to the one upon whom he has inflicted the loss. He may be compelled to do so by the injured party, who resorts to a suit at law for that purpose.

6. Remedial Law ; Common Law Courts. — The second great division of municipal law, which we have called "Remedial Law," deals with the organization and composition of courts and the manner in which one may enforce his claims therein. It is not our purpose to go into an extensive description of the courts or the manner of suing in them; but it should be pointed out that there are two great systems of justice which are administered in this country. The courts of common law we have already referred to. They were the earliest courts organized in England, and were transplanted to this country when our ancestors came over to make this their new home. These courts are governed by common law rules and are strictly bound by precedent, as has already been explained.

7. Courts of Equity. — There is, also, a second system which has developed in England and in the United States. A great many years ago it became evident that the common law did not offer ample remedies for all the wrongs which were inflicted upon individuals. The common law could punish a man for not carrying out a contract which he had made, and could compensate the other party to the contract by decreeing the payment of a sum of money by the person who had broken the agreement; but it had no power to make either or both parties carry out the agreement to the letter. The common law could force a man to pay any damages which he had inflicted upon another by reason

of trespassing upon his land and tearing down his house; but it could not act upon the person of an intending wrong-doer and prevent him from doing the unlawful act, even though that act would result in an irreparable injury to another, who could not be compensated in money for the loss of his homestead. These are two illustrations of cases in which the common law failed to do justice, by reason of the rigid rules under which the courts had administered it for so many years.

In order to meet this need the system of equity courts was invented and gradually grew up in England. A court of equity differs from a court of law, so called, first, in that it offers what are known as "Extraordinary Remedies," namely, remedies not recognized by the common law; and second, in that it is not bound by iron-clad rules when it is seeking to administer justice. These courts of equity, under various names, were transplanted to this country. In some states the courts of common law administer both common law and equity; in others there are still the two distinct courts; as we proceed, we shall understand more clearly the difference between legal and equitable remedies.

8. Development of Various Phases of Law relating to Property. — Having thus taken a rapid glance over the whole field covered by municipal law, we return for a more careful consideration of the "Rights of Things." The first branch of the law to attain form was that which related to land. This was very natural, since in ancient times land was the principal and almost the only property of value. As the community grew older, however, and other means of livelihood besides the tilling of soil came to be largely followed, new branches

of law were developed to govern and regulate men's actions toward each other in these new relations. The acquisition and ownership of movable property gave rise to the law of personal property. As men began to engage in trade, they formed agreements with one another to do or not to do specified things. The necessity of holding each other to their bargains gave rise to the law of contracts. When commerce became more extensive, so that men often wished to deal with others in foreign lands, the law of agency became a necessity. To facilitate freedom of exchange, negotiable paper came into use, together with the rules governing its transfer from hand to hand. In more recent times the law relating to corporations has become of vastly greater relative importance than formerly, on account of the continued multiplication of that form of business association. Without going further into the subdivisions of the law relating to property, it can readily be seen why they have developed as the needs of the community called them forth.

PART II

CONTRACTS

SECTION I

FORMATION OF CONTRACTS

CHAPTER I

NATURE OF THE CONTRACTUAL RELATION

1. **Definition.** — We are to discuss in this book the law relating to the more common business transactions, and more particularly the law of contract in its various phases. We naturally think of a contract as being an agreement between two or more persons. Many authors so describe it. This definition, however, does not accurately define. An agreement between two or more parties may create a contract, but the contract itself is something more — it is a legal relation between the parties. This legal relation confers rights and liabilities upon both. If you have agreed to sell one hundred bushels of wheat to B, and he has agreed to buy, each of you has certain rights over the other. You have a right to force B to accept and pay for the grain; he has the right to have you furnish it to him upon payment of the price agreed upon.

2. Why Contract and Agreement are not the Same. — It is this relation between the parties which is really what we mean when we use the word "contract." As we have pointed out, the agreement may operate to create the relation, but is not itself a contract.

The proof of this lies in two facts. First, it is possible to make a contract without an agreement. Suppose I agree to sell you my brown horse for one hundred dollars — I really mean my black horse, but you accept the offer of the brown horse as I make it. Is there a contract? According to some very eminent authorities, there is. If this be true, then, you have a contract founded, not upon an actual agreement, or, as it is called, a meeting of the minds of the two parties, but founded upon the words which passed between them. Second, all agreements are not contracts. If you make an agreement to dine with a friend there is an agreement, but no contract. There is no contract because the agreement was not intended to create legal relations. A mere social engagement is not an agreement upon which the law will found a contract.

From these illustrations it can be understood why it is incorrect to say a contract is an agreement. At the same time, it may simplify matters somewhat to use the more common phraseology and define a contract to be an agreement. When we say that, however, we may add that the agreement must be one which is enforceable at the law or else it cannot be a contract. There are a number of things besides the agreement which we must take into consideration before we can say that a contract exists. These will be explained when we take up the discussion of the essential elements of a contract in the next chapter.

CHAPTER II

CAPACITY OF THE PARTIES

1. Essential Elements of a Valid Contract. — In order that the agreement may create a contract enforceable at the law, there must be present the following essential elements: (1) The parties must be capable of making a contract. (2) There must be a definite expression of agreement between them, usually consisting of an offer made by one and accepted by the other. (3) There must be what is known as a “consideration” for the contract, *i.e.* some benefit must have been given to the party making the promise, or some disadvantage must have been suffered by the other, or else the agreement must be expressed in a particular form, known as a “contract under seal.” (4) The expression of agreement must be genuine, *i.e.* it must not have been brought about by deception or by force. (5) The object contemplated by the parties must be legal.

2. What is Meant by Capacity of the Parties. — It goes without saying that parties cannot contract unless they are legally capable of contracting. Generally speaking, everybody can contract, except those who for some reason are incapable of contracting, — those who are under some disability. The discussion of the capacity of the parties, therefore, resolves itself into a discussion of the various disabilities which may pre-

vent an otherwise capable person from contracting. There are only two disabilities that it will be necessary to dwell upon at any length, namely, infancy and lunacy. According to the old common law, a married woman was unable to make a contract except in certain very limited situations; but this disability, called the disability of "coverture," has been entirely removed in England and in most states in this country.

3. Contracts of Infants. — An infant is any person under the legal age of majority; this age is usually twenty-one years for a male; the rule is generally the same for females, though in some states they are of age at eighteen. No person is capable of making a binding contract until he has reached his majority. But suppose an infant of the age of eighteen years attempts to make a contract and enters into an agreement which, if made by a person of full age, would create a legal obligation. That contract, if we may so call it, will remain in a state of suspense until the infant becomes of age. It may then become binding upon him or of no validity whatever, depending upon whether he expresses his willingness to go on with it or repudiates it altogether. Suppose you, being an infant, agree to purchase my house. After you become twenty-one years of age you come to me and tell me that you are of the same mind, and wish me to consider the matter as settled according to our original contract. You cannot thereafter draw back—you will be bound. But if, instead of agreeing to go on with your contract, you had told me you had changed your mind and had decided not to purchase, then the contract would be at an end, and I would be unable to force you to accept and pay for the house.

4. Infants may repudiate Contracts during Minority. — The question now arises whether the infant, supposing he has made an agreement purporting to create a contract, is able to repudiate this contract before he becomes of age. It is clear that he cannot ratify it, for he did that impliedly when he first made it, and no subsequent ratification would be of any validity until the infant has become of age. But he may repudiate a contract during minority, so that it absolutely ceases to have any legal existence from that time. Suppose, while you are an infant, you purchase an automobile, agreeing to pay therefor one thousand dollars. Accidentally it runs into a river, and is entirely destroyed. You then conclude that you do not wish to buy it and you go to the seller and repudiate your bargain. He has no redress. Had you retained the automobile he could make you give it back to him, but now that it has been destroyed, without fault on your part, he loses everything unless you choose to pay, for your contract does not bind you. If you had destroyed the automobile wilfully or carelessly, he might have recovered damages against you for mistreating his property; but he can recover nothing on account of the agreement which you made.

5. Infants must Affirm or Repudiate upon Coming of Age. — When the infant becomes of age he must, within a reasonable time, choose which he will do,—ratify or disaffirm his contract. Whichever he does, he will then be bound accordingly. If the infant ratifies his contract by signifying his intention to abide by it, it is treated as being binding from the first day it was made. If he repudiates, it is considered as never having been of any validity. The ratification

or repudiation dates back to the time of the original agreement.

6. How Ratification or Disaffirmance may be brought about. — This ratification or disaffirmance of the contract, whichever it may be, need not be brought about by express words. It is not necessary for the infant to say, "I repudiate," or "I ratify." Either ratification or disaffirmance may be brought about solely by actions. Suppose, while under age, you purchase X's house, move into the property, and treat it as your own. After you become of age you remain in possession, continuing to live there for two years. You have, by your conduct, ratified the agreement and are bound to pay the price. On the other hand, if you move out soon after attaining your majority, cease to exercise any acts of ownership over the premises, refuse to pay X any more money, and demand the return of that which you have paid him, you have, by your conduct, disaffirmed. Few cases are so plain as this, and it is often very difficult to determine whether the acts do or do not amount to a ratification.

It would be out of place in this elementary book to go more minutely into this particular phase of the question, but one rule may be pointed out as universally correct by which to interpret conduct in such cases. If the contract is executed, *i.e.* if the parties have performed their agreement, and, after reaching his majority, the infant does nothing to repudiate, but treats the contract as continuing, then, after the expiration of a reasonable time, it will be deemed to have been ratified. If, however, the contract be executory, *i.e.* if neither party has performed (*e.g.* if, in the illustration, though the contract had been made to sell

the house, possession had not been given), then a failure on the infant's part to change the existing condition of affairs would result in a repudiation. After the lapse of a reasonable time an executory contract is considered to be disaffirmed.

7. Infant's Contracts which are Binding. — There are two exceptions to the rule that an infant's contracts are never binding. These exceptions are contracts for necessities and marriage contracts.

Contracts for necessities are held binding for the protection and welfare of the infant. If he could not bind himself to purchase the necessities of life, he would be in danger of starvation in the midst of plenty. The only puzzling question which arises in such cases is, What are necessities? That is decided by taking into consideration the wealth, position, mode of life, etc., of the infant. A horse and carriage has been decided to be a necessary for a wealthy infant, who had been ordered by his physician to ride for his health. Clothing, board and lodging, educational expenses, etc., are always necessities. Surveying instruments for a student of civil engineering, microscopes for a student of biology, tools or instruments necessary for the practice of a profession in which an infant is engaged, would all be necessities. On the other hand, "a wild animal or a steam roller" probably never would be. Between these two extremes there are many articles that come very close to the border line. A bicycle was formerly classed as a luxury. Now it has in some instances become a necessary.

Not only must the article be one properly termed a necessary, but the amount expended must not be greater than could reasonably be considered indispen-

sable to the comfort of the infant. If he is very extravagant in dress, the salesman should be on his guard, for the "necessary" rule will not protect him. In one case where a young man had purchased seventeen pairs of trousers, the court came to the conclusion that such a large number at one time was not necessary, and his contract did not bind him. The clothing which would be necessary for a university student would not be considered so for a trolley-car conductor. The court attempts to judge each case on its merits, and to adjudge those articles necessities that can fairly be said to be essential to the comfort of the infant, taking into account all his external surroundings. No precise rules can be laid down.

Marriage contracts of infants are held binding for reasons of public policy, provided the parties are old enough to know what they are doing.

8. Contracts of Lunatics. — A lunatic in the eye of the law is a person of unsound mind, or, to use the legal phrase, one who is *non compos mentis*. Mere eccentricity must not be taken for insanity, nor should it be supposed that a mere temporary loss of reason will affect a contract made by a man during a lucid interval. As a general rule, the contracts of a lunatic may be declared invalid, if the other party to the contract dealt with him knowing him to be a lunatic, or after a commission had declared him to be insane. If, however, a man contracts with another apparently sane, but who, unknown to him, is really insane, most courts will uphold the contract. The question is a disputed one, and there is no precise rule which can safely be laid down. A contract made by a lunatic for the necessities of life will bind him as in the case of an infant's contracts for necessities.

9. Where One Party is Intoxicated. — Gross intoxication is one form of lunacy. Very often a man will attempt to avoid a contract by stating that he was drunk at the time he made it. If he was so much under the influence of liquor as to be entirely insensible to what he was doing, and the other party knowingly took advantage of him, there is no contract. The courts, however, are very slow to let a man off from his contract upon this plea, and it must be very clear that he was entirely unable to transact business.

CHAPTER III

OFFER AND ACCEPTANCE

1. **Offer and Acceptance must be Definite.** — Before the contract can be created there must be an expression of agreement between the contracting parties. As we tried to show in the preceding section, it is not always necessary that there be an actual agreement perhaps, but it is absolutely necessary that there should be a definite expression of agreement. This usually takes place by one party making an offer which the other party accepts. The simplest form of such an expression of agreement might be illustrated as follows: A says to B, "I will sell you my horse for one hundred dollars." B replies, "I accept." The contract is complete. If, however, either the offer or acceptance be indefinite there is no contract. If A had said to B, "I will sell you either of my horses for one hundred dollars," and B had replied, "I accept your offer," there would have been no contract because there was no definite acceptance. If B had said, "I accept, and choose the black horse," there would have been a contract, for in that case the expression of agreement would have been definite and complete. In all cases where the offer is in the alternative, the one to whom the offer is made must state which alternative he accepts. A wrote to B, saying, "We will ship you as many tons of pig-iron

as you wish." In his letter he named two prices, one price if B should order the iron to be shipped by canal, and a higher price if he should order it to be shipped by river. B replied, "Ship me one thousand tons." There was no contract because B did not state which alternative he accepted.

In the same way, if there be any ambiguity in the offer, even a definite acceptance will not create a contract. A wrote to B, "We have a few jars which we will be willing to sell," naming a price. B replied, "I accept, and will take five hundred of them." There was no contract in that case because the offer was not definite. A few jars may mean any number from five to five thousand. The court said A had not offered to sell any specific number, and as he did not have as many as five hundred, he was not liable for breach of contract. In all cases both the offer and the acceptance must be definite.

2. Acceptance must be Absolute. — Not only must the offer and acceptance be definite, but the latter must be unconditional and identical with the terms of the offer. The one who makes the offer is called the offeror, and the one to whom the offer is made is called the offeree. We shall often refer to these two parties by these names. A offered B a farm for five thousand dollars. B replied, "I accept, subject to terms to be agreed upon between your attorney and mine." It was decided by the court that no contract had been made, because B's acceptance was coupled with a condition — it was not absolute. If the offeree undertakes to introduce new conditions into the contract not embodied in the offer, his acceptance is not absolute. A offered to buy B's farm for ten thousand dollars; B declared he accepted the offer, and sent a contract to A for him to sign.

This contract stipulated that A should pay a deposit of ten per cent. of the purchase money, and that he should complete the payment of the remainder within a limited time. A refused to sign; B claimed that by so doing he had broken his contract, but the court said there was no contract, because B had attempted to introduce new terms into the agreement.

3. Offer and Acceptance may take place by Words or Conduct. — Having ascertained the essential characteristics of offer and acceptance, we will next consider how this expression of agreement may be brought about. Is it necessary that in all cases the offeror should use the words "I offer," etc., and that the offeree should definitely say, "I accept"? Very few contracts are made in that manner. It is not necessary that any particular form of words be used. An offer may be made either by words or by acts. The merchant who exposes his goods for sale, by his conduct offers them to the public upon the payment of their price. If you go to the store and take the goods, you have by your act accepted the offer of the merchant, and the contract is complete. Street-car companies, by running their cars over the streets of a city, offer to carry any persons who choose to avail themselves of their services and to pay for them. If you board a car, you accept their offer and thereby agree to pay the fare.

Sometimes it is possible for a man to accept the offer of another without even doing an act. Suppose some one does a piece of work for you without your request, but you know he is doing it and offer no objection, and the circumstances being such that no reasonable man would think the work was being done for nothing. You, by your conduct, have accepted his offer to give

you his services in return for what they are reasonably worth, and you are bound accordingly.

4. Conduct must be Unequivocal. — It must not be supposed, however, that in such cases a man may force his services upon another and drag him into a contract to which he really gave no consent. The conduct must be of such a nature that the court is perfectly well satisfied the parties knew what they were doing, and impliedly assented to the closing of the bargain. A asked B, who was a contractor, to make an estimate as to the cost of altering and repairing certain offices. B did so, and sent the estimate to A. A made certain alterations in the specifications and sent the papers back to B, saying, "If these changes are satisfactory, you may begin work any time." Without saying anything further, B began work, purchasing lumber, materials, etc. Subsequently, A refused to carry out the terms of the paper. When B sued for damages, the court said there was no contract, because B had not definitely accepted A's proposition. This decision is a very close one. If A had clearly said, "I shall consider your beginning of the work as an acceptance of the offer," there would without doubt have been a contract, but, under the circumstances, the court thought A had intended B to answer him definitely whether he accepted the altered terms of the specifications. By saying B could begin any time, he merely meant that, after B had accepted the offer, he need not delay about commencing the work.

5. Offer need not be Made to a Specific Person. — Having seen that the offer must be definite in its terms, the inquiry naturally arises, Must it be definite as to the person to whom it is made? Must the offer be

made to one specific individual, or may it be made to a number, any one of whom has the privilege of accepting? It goes without saying that the offer must be made by an ascertained person, but as long as it is accepted, sooner or later, by some particular individual, it is not necessary that the offer itself should have been specifically directed to any one individual. The offer may be made to the public. In the illustration of the street-car, the offer was made to all the people in the city. As soon as the intending passenger boards a car, he thereby notifies its officers that he accepts the offer, and completes the contract between himself and the street-car company. If you advertise in the papers, offering a reward for the return of a lost article, the man who brings back the lost article, by his conduct, accepts the offer which you have made, and completes the contract. In such cases it is not necessary that the one who accepts the offer should have notified the offeror that he is going to do so; it is sufficient if he does some definite act, signifying that he does accept.

A curious case which involves this point was decided in England a few years ago. A patent medicine company, called the "Carbolic Smoke Ball Company," in advertising a patent medicine for the prevention of influenza, offered to give the sum of one hundred pounds to any person who contracted influenza immediately after taking their smoke balls three times daily for two weeks, as explained in the printed directions. An enterprising woman used the smoke balls as directed for two weeks, and then, accidentally or otherwise, contracted a severe cold and sued the company. The company objected that there was no contract, because this woman had not notified them of her acceptance of

their proposition; but the court refused to take this view of the matter, and permitted her to recover the one hundred pounds. They said the fulfilling of the conditions on her part, namely, the use of the smoke balls according to the directions, was a sufficient acceptance, and it was not necessary for her to send word to the company that she was going to try the efficacy of their medicine.

6. Offer must be Consciously Accepted by an Ascertained Person. — We have seen that an offer may be made to the public, but it is clear that there can be no contract created until some specific individual has accepted the offer. The question might arise in this connection as to what is meant by acceptance. It is quite possible that some member of the public may do an act which in itself would constitute an acceptance of your offer had he been aware that you had made the offer; but would it, if, at the time he had made the contract, he was in ignorance that an offer had been made? Suppose you offer ten dollars for the return of a lost dog. X finds the dog and returns him to you, but he does not know that you have offered ten dollars for the return of the animal until after he has delivered him over to you and has gone away. He subsequently sees the offer which you made, comes back to you, and demands the reward. Can he get it? There is some conflict of authority upon that point; but it now seems to be pretty well settled that he cannot. A man cannot be said to have accepted an offer of which he knew nothing. There is no contract until the offer has been consciously accepted by an ascertained person.

7. Contract complete when Acceptance is Communicated. — Having seen that the offer must come to the knowl-

edge of the offeree, we next ask, When is the contract complete? You remember the illustration in which the contractor was told that if he was satisfied with certain changes made in the specifications, he could begin work at once; he certainly accepted the offer, and yet there was no contract. Why? Because the acceptance was not communicated to the offeror. A man may make you an offer and you may mentally accept it, but no legal rights are created until you have communicated that intention to him. A's insurance policy on his barn had expired. He went to B, the agent of the company, and left the papers with him, telling him to renew the policy. By this act A made an offer. B said nothing, but merely accepted the papers. Before the new policy was made out, A's barn was destroyed by fire. The question then naturally arose whether the company was liable for the amount of the insurance. The court decided that it was not, because B had not definitely communicated to A his acceptance of the offer. The contract is complete when, and not until, the acceptance has been communicated either by words or by conduct.

8. Acceptance Communicated when sent in the Manner Indicated by the Offeror. — Having seen that the acceptance must be communicated, we next ask, When is it communicated? Is it communicated when the offeree has sent word to the offeror, even though the information does not reach the latter, or is it communicated only when the offeror actually knows that the acceptance has been sent? That question has given rise to much litigation. As we shall see, in many cases neither party is at fault, and yet the communication never reaches the offeror.

The rule, which we shall understand better later on, is that if the offeree sends his acceptance in the manner indicated by the offeror, at that moment the contract is complete, although the acceptance has not as yet actually reached the latter. A had negotiated for a policy of insurance upon his barn. He wrote a letter accepting the offer which an insurance company had made to him, and enclosing a check in payment of the first premium, on July 10. The letter reached the office of the company on July 12. On the night of July 11 the barn was burned down. Here it was very material whether the contract was closed when A mailed the check on the 10th or when the company received it on the 12th. If it was completed on the mailing of the check, then the company would be liable for the amount of the policy. If not until the 12th, the owner would have to bear the loss himself, because at that time there was no building to insure. The court decided that the mailing of the letter closed the contract, and the company was bound to pay the loss.

9. Contract complete even when Letter of Acceptance is lost in the Mails. — If you strictly apply the rule which we have laid down, you will see that there is a perfect contract, even if the actual communication of the acceptance never reaches the offeror. If it be literally true that the contract is complete when the acceptance has been sent in the manner in which the offeror indicates, then the actual arrival of the letter or telegram at its destination is immaterial. A wrote to B, offering to sell him lumber at so much per thousand feet. B replied immediately, accepting the offer. B's letter of acceptance was lost in the mail, and A, not having received it, after a reasonable time, sold the lumber

to another party. A has, it would seem, every reason to believe that B has not accepted his offer, because he hears nothing from him. On the other hand, B has accepted, and is relying upon A to fulfil the contract. That looks like a hard case for some one, and so it is. It is one of those very close legal questions — so close that it would be decided differently if the case arose in different states. In most states the contract is complete upon the mailing of the letter, and A would have to respond in damages for having failed to fulfil it. In Massachusetts, however, the courts have decided that there is no contract until the letter of acceptance actually reaches the offeror.

10. Contract probably Complete when Letter containing Offer is Delayed. — Sometimes it is not the letter of acceptance which is delayed, but the letter containing the offer. In such a case, supposing the offeree answers promptly according to the directions contained in the offer, would the contract bind the offeror? A wrote to B offering to sell him some wool, and directing B to reply by return mail. A misdirected the letter so that B did not receive it until three days later than he otherwise would have done, but he then replied immediately as A had directed. The price of wool was fluctuating, so that A, after waiting until after the time when he expected to have received a reply, sold the wool to some one else. A does not seem to be in fault, for he has waited a reasonable time. B does not seem to be, for he replied at once upon receiving the letter. Who should suffer the loss? The court decided that there was a contract, and that A was liable in damages for its breach.

Consider that decision for a moment. Do you think

it correct to say that neither one of the parties was at fault? It seems that B, upon observing the date of the letter to him, should have known it had been delayed, and that in all probability the wool had been disposed of. Suppose A is a dealer in perishable fruit, such as peaches, which will sometimes spoil in a day after picking, and which must be shipped at once. Suppose A, who lives in Delaware, offers the product of a day's picking to a dealer in Philadelphia, and requests an answer the same evening. His letter is delayed, and upon receiving no answer he sells the peaches elsewhere. Could the buyer accept the offer several days later, and hold A responsible? It seems clear that he could not, and such is the law in cases like this, where the goods are perishable.

11. No Contract if Acceptance is sent Contrary to Instructions. — We have seen that if the acceptance be sent according to the manner in which the offeror suggests, the risk of miscarriage is upon him, and the contract is complete as soon as the acceptance has been properly sent. But suppose the offeree disregards the directions of the offeror and sends his acceptance in another manner. In such a case as that the offeree has himself assumed the risk of miscarriage, and there is no contract until the knowledge of the acceptance actually comes to the offeror. A, who was a dealer in flour, sent a message to B by the man who drove his delivery wagon, offering to purchase flour of him. He requested that B's answer be sent back to him by the wagon. B, thinking he could reach A sooner by mail, sent his answer in that way, accepting the offer. The wagon returned before the mail, and, upon receiving no answer, A concluded B would not sell at the

figures he named, and made other arrangements. It is clear that there was no contract, for B deliberately disregarded A's instructions.

12. Offeror Assumes Risk of Miscarriage. — In some situations it must be a hardship whichever way you decide. Suppose you send me an offer by your office boy, requesting an answer to be sent back in the same way. The boy is killed while on his way back with the acceptance. Neither of us is to blame, yet you would be bound. Or, again, to borrow an illustration from Sir William Anson, suppose you send a messenger across a lake conveying an offer to me. You request me to light a fire on a certain peak at 10 P.M. if I accept your offer. I light the fire; there is a heavy fog over the lake so that you cannot see it. Who is to blame? Nobody, and yet you are responsible. The reason why, in all these cases, the offeror is held responsible is because he is the one who voluntarily acts. He begins the proceeding and takes the risk that an acceptance communicated in the manner which he indicates will reach him. If it does not, he is bound, provided the offeree has done as he instructed him. We can thus lay down the general proposition that whenever the acceptance has been sent in the manner indicated by the offeror, it is considered to have been communicated, and the contract is closed. To this it may be added that where nothing is said about the manner of communication, it is understood that one of the common means is to be employed, *e.g.* the mail, telegraph, etc. This is the general rule, although it may be well to remember, especially if you live in Massachusetts, that the rule in that state is the other way.

13. Letter of Acceptance may be Revoked by Offeree. —

One more situation may be referred to at this point with regard to the respective liability of the offeror and the offeree. When the offeree mails his letter of acceptance, we have said that the contract is complete. That is true; but suppose the offeree telegraphs a rejection of the offer, which rejection actually reaches the offeror before the letter of acceptance comes to him. Would there be a contract? There would not be. It may be asked what about the rule that the mailing of the letter of acceptance closes the contract? The answer is, that the mailing of the letter closes the contract so as to bind the offeror, but the offeree is not bound until the letter of acceptance actually comes to the knowledge of the offeror.

14. The Offer may be Withdrawn at any Time Before Acceptance. — The next question which we will discuss is whether any rights are conferred upon the offeree by the making of the offer, but before it has been accepted. Suppose I offer to sell you my horse for one hundred dollars; you ask for half an hour to think the matter over. At the end of that time you decide to buy the horse, and return to accept my offer. In the meantime another man has offered me one hundred and twenty-five dollars. As soon as you come in, and before you have a chance to accept the offer, I say, "I have changed my mind; I will not sell you my horse for one hundred dollars; I withdraw my offer." You reply: "You have offered him to me for one hundred dollars, and I accept. Here is your money." Would there be a contract? That would depend upon whether the fact that I made you an offer would give you any legal right over me. Is there any obligation resting upon either party merely by

virtue of the fact that one has made the other an offer? In this case there would not be a contract. An offer may be revoked at any time before acceptance. If you revoke an instant before acceptance, you are safe.

But suppose, in the previous illustration, B goes off and does not return within the half hour, but stays away two or three hours, then returns and accepts before you have a chance to revoke. Would that be a contract? It would not be. If a definite time is stated in which the offer must be accepted, and it is not accepted within that time, it is said to lapse without any revocation on the part of the offeror. If the offer is made and no time is stated in which the acceptance must be made, it will lapse after a reasonable time has expired, and an acceptance thereafter will have no effect. An offer may also lapse by the death of either party at any time before acceptance. So we see that there are three ways in which an offer may be withdrawn before acceptance: by revocation on the part of the offeror, or by the lapse of the offer through the expiration of a reasonable time or the time limited, or by the death of either party.

15. Revocation Not Operative until it comes to the Actual Knowledge of the Offeree. — We have seen that the mailing of a letter of acceptance closes a contract, and that it is not necessary for the letter of acceptance actually to reach the offeror. We now come to the question, When does the revocation of an offer become operative? Does it become operative at the moment the letter of revocation is mailed, or when the letter actually reaches the offeree. A, in Liverpool, wrote to B, in New York, making him an offer. B at once mailed a letter of acceptance. While the letter was still on the

way over, A cabled a withdrawal of the offer. Is there a contract? Clearly, yes, if we apply the principles we have learned. B's mailing of the acceptance closed the contract before the revocation was sent.

Now suppose A writes to B on November 3 making him an offer, and the next day, November 4, repents of his action and mails a letter of revocation. B receives the offer on November 10, and mails his letter of acceptance on the same day, seven days after A had, by letter, revoked the offer. The next day, the 11th, B receives A's letter of revocation. That state of facts brings up the question whether A's letter of revocation became operative the moment he mailed it? If so, then clearly there was no contract, because the letter of revocation was mailed on the 3rd, long prior to the acceptance. On the other hand, B's letter of acceptance was mailed before he knew of the revocation, and we ask, naturally, What about the rule that the mailing of the letter of acceptance closes the contract? If both are to be operative on the day of mailing, we are bound to have a conflict. The rule is, that the revocation is not operative until it has come to the knowledge of the offeree. So we see again that the offeree seems to have all the better of it, and, in a sense, this is just because he does not do the acting. The offeror is, as a rule, the one who is seeking the contract and, therefore, he assumes the risk.

16. Offer may be Revoked by Conduct. — Just as a contract may be accepted without any express words of acceptance, but by conduct merely, so an offer may be revoked in the same manner. If you offer to sell me certain property, and before I accept you sell to some one else, and I am informed of that fact by you, the

offer is revoked just as much as if you had definitely said to me, "I withdraw my offer." In such cases, however, the notification of the action which results in the revocation of the offer must be sent to the offeree, or else he is entitled to treat the offer as still remaining open. Suppose I offer to sell you my house for twenty thousand dollars and promise to hold the offer open until to-morrow at 4 P.M. At noon to-morrow X comes and offers me thirty thousand dollars, and I close with him at once. At 3 P.M. you accept my offer. Assuming that I have not notified you of the sale to X, it seems clear enough, on the principles we have just been discussing, that I will be held responsible; and yet, strange to say, one or two leading cases were decided the other way not so very long ago. The law, however, is now settled more in accordance with the general principle, that in such a case I would be liable because I did not communicate my revocation of the offer to you. It would seem, at first thought, that I would be bound to keep my offer open until 4 P.M., according to my promise, or I would be liable in damages for failing to keep my agreement to hold the offer open until that time. This would not be true in the illustration we were considering, because I received no consideration for the promise to hold the offer open. It was a mere gratuitous promise and, as we will learn in the next chapter, not binding upon me. I was perfectly at liberty to revoke at any time, provided I informed you of the fact.

17. Knowledge of the Revocation should come from the Offeror. — In cases where the offeror has not distinctly stated that he withdraws his offer, but has done so by his conduct, the question sometimes arises whether it

is necessary that the offeree should have been informed of the withdrawal of the offer by the offeror himself, or whether it would not be a sufficient notification if some third party had actually informed him of the fact.

You remember in the above illustration, that I offered to sell you a house, promising to hold my offer open until 4 P.M. the next day, but had sold at noon to X. Assume that you hear of the sale at 2 P.M. by a roundabout way, and come to me and accept at once in order that you may have a claim against me for breach of contract, as you know that I cannot now fulfil it. At first glance, one would say there is no contract; but on second thought, you can see into what embarrassment such a conclusion would lead us. One would be obliged to act, perhaps to his own damage, upon no better information than mere rumor; it seems that a knowledge of the revocation of the offer must come directly from the offeror to be effective. It is probable that in the illustration just given there would be a contract.

CHAPTER IV

FORM AND CONSIDERATION

1. **Necessity for Seal or Consideration; Classification of Contracts.** — We have now brought the two parties together, and they have come to a definite expression of agreement; yet something more is required before this agreement becomes a contract enforceable at the law. When we remember that the relation which is established between two persons when they enter into a contract confers rights and liabilities upon each of them, we can understand why the law requires something more than a mere expression of agreement before it will fasten upon them these rights and liabilities. In order that the agreement may become a binding contract, something of value, called a "consideration," must have passed between the parties, as compensation for the promises contained in the contract, or else the agreement must have been expressed in a particular form, called a "contract under seal."

If either of these two requisites has been complied with, then the agreement, which before was of no validity whatever, will create a binding contract. If the agreement be expressed by a sealed writing, it thereby becomes an enforceable contract, but it is absolutely necessary for all those contracts which are not under seal to be supported by a consideration. Consideration, as we shall explain more fully hereafter, consists of any

legal benefit conferred upon one party by the other, on account of the contract into which he has entered, or of any injury suffered by the first party, on account of the promise which he has made. In view of what we have said, contracts naturally fall into two divisions. Formal contracts, which depend for their validity upon the form in which they are expressed, and simple contracts, which to be valid require the presence of consideration.

2. Formal Contracts; Contracts of Record. — There are two kinds of formal contracts which are valid without consideration. These two kinds are “contracts of record” and “contracts under seal.” Contracts of record, so called, are really not contracts at all, and, strictly speaking, the name should not be applied to them. If I sue you in the courts, and judgment for ten thousand dollars is rendered in my favor, you owe me ten thousand dollars—not by virtue of any present contract, for none has been entered into, but merely by virtue of the fact that the court has adjudged in my favor. The record of this judgment, properly made out by the court officials, is known as a contract of record. It is enforceable by the court’s order, and requires none of the usual characteristics of a contract to render it valid. Why it should be called a contract is not clear, for it is conceded that it is not a contract in the usual sense. There has been no meeting of the minds of the two parties. On the contrary, each was fighting the other. They were probably as far from agreement after the court’s decision as they were before.

3. Contracts under Seal; What a Seal Is. — The true formal contract, and the only real agreement which is enforceable without the presence of consideration, is a

contract under seal. A contract under seal is one which has been reduced to writing, and which has been signed and sealed by the contracting party or parties. The one peculiar feature of it is that it must be sealed. When we speak of sealing a contract in this sense, we mean that the party who signs his name must place after his signature a seal. In ancient times this seal was required to be of wax, which was either tied to the paper with ribbons or fastened on by some adhesive substance. Such seals are still very common, and may be seen on papers which have been executed before a notary public, or on diplomas, or any papers issued by universities or colleges or other corporations.

The old common-law rule prescribing a particular kind of seal has been abolished in most states in this country. If you use appropriate words, *e.g.*, "witness my hand and seal this 23rd day of November, 1899," and after signing your name make a mark of almost any kind with the intention for it to represent a seal, you have sealed the paper sufficiently. In the state of Pennsylvania, a pen mark one-eighth of an inch long was decided by the court to be a sufficient sealing, when it appeared it had been put upon the paper for the purpose of representing a seal. It goes without saying that if the pen mark had been a mere chance stroke or flourish, it could not have constituted a seal. The rule of interpretation is to ascertain, if possible, the true intention of the parties. If they have placed appropriate words on the paper, almost any legible mark which is obviously intended to represent a seal is sufficient in a majority of the states, though in a few the old wax seal is still required.

If it appear that the original intention to seal

the paper has not been fully carried out, then the contract is treated as a simple one. In one case slits had been made in the paper for the insertion of the ribbon with which to fasten the seal, but no seal had been affixed. In that case it seems clear that the parties had stopped before they had completed the sealing of the paper. Accordingly, it was decided that the contract was a simple one. Upon most papers which are intended to be sealed a sufficient seal is already affixed, so that all the parties have to do is to sign their names. On such papers you will see a small round figure with the letters L. S. (*Locus Sigilli* — the place of the seal) stamped in its centre. This figure is generally a sufficient seal.

4. The Effect of Sealing a Contract. — Having seen how to make a sealed contract, the next question is, What is the effect of thus sealing it? As has been explained, when the agreement is not under seal, it is necessary for some valuable consideration to have passed between the parties, or the contract will not be binding. But when a man seals a contract which he has made, it is not necessary that there shall be any consideration. When he affixes the seal he is supposed to add to the solemnity of his action. The theory is that by the act of sealing the paper he indicates that he has considered his action well and enters into it only after due deliberation and mature reflection.

It may be thought after the explanation we have given of what constitutes a seal, that there is really little additional solemnity in the act of sealing an instrument. This is true, but the legal effect of the seal remains, although the formality formerly observed has been dispensed with. In earlier times a man's seal was more

distinctly his own than his signature; in fact, papers were sometimes not signed at all, but simply sealed with the seal of the party who was being bound. All of the edicts published by the king were sealed with the king's seal, and the keeper of that seal was a functionary of the greatest possible importance. To question the intention of agreements thus deliberately expressed was not to be thought of. In these days of practical simplicity these formalities have been gradually abandoned, but owing to the rigidity of the common-law rules the legal effect of the sealed instrument is still retained. Some authors explain the fact that a contract under seal is valid without consideration by saying that the seal itself gives validity to the contract; others say the seal raises a presumption that a consideration had been given by one party to the other, the court refusing to admit any evidence tending to contradict this presumption. The result, for our purposes, is about the same. A gratuitous promise can be enforced if made under seal.

5. Merger. — A contract under seal is, therefore, of a higher or more solemn order than a simple contract. Suppose A and B make a simple contract by which A agrees to sell B a house for so much money and at a certain time; at a later date, the same parties enter into an agreement to do the same thing, and execute this agreement under seal. In such a case the simple contract disappears, and we have left only the sealed contract. This phenomenon is known as "merger." The lesser is said to merge into the greater.

6. What Contracts must be made Under Seal; the Deed; Delivery in Escrow. — There are some kinds of instruments and contracts which are valid only if made under

seal. One of the most common of such instruments is the deed. A deed is an instrument the terms of which are written on paper or parchment, signed by the parties, sealed, and delivered to the person or persons upon whom it confers rights. The kind of deed which is perhaps most familiar is the deed for the conveyance of land. All of the elements just mentioned are necessary in order to give it validity. Not only must it be signed and sealed, but it must also be delivered before any rights are conferred by it.

A, a man advanced in years, who desired to give his nephew B a farm upon the event of his marrying C, made out the deed and deposited it with X, his attorney, directing him to deliver it to B upon the day when he married C. This instrument conferred no rights upon B prior to the date of its delivery to him. In the meantime it is said to be in *escrow*, the term always used to describe a deed deposited with one person for future delivery to another. In the case we are discussing, A could have made out a second deed to some other party, and if he had delivered it prior to the date when the first deed was actually given to B, the latter would get nothing. The second deed would have been fully executed before the first one, for the reason that it was delivered first.

7. Bond and Warrant of Attorney. — As has already been indicated, a gratuitous promise is binding only if made under seal. Accordingly, a promise of this nature must be so expressed. An example of a gratuitous promise is the bond. A bond is a sealed instrument, containing a promise on the part of the individual who executes it, to pay money. This promise to pay may be conditional or unconditional. The most common

bonds are those executed for the faithful performance of one's duties (as in the case of an officer who is required to handle money) or bonds providing for the payment of money which the promisor owes, with a penalty for non-payment at maturity. An example of the first would be a case where a man is appointed treasurer of a corporation. He would be required to file a bond, in which he agrees to pay to the corporation a large sum of money, usually fixed at double the amount he is to handle. The bond, however, contains a provision that if he faithfully performs the duties of his office then the obligation is to become void.

To illustrate the second kind of bond, suppose you owe me five hundred dollars which you are to pay me before January 1, 1901. You might file a bond with me, by which you obligate yourself to pay me one thousand dollars on January 1, 1901, but with a *proviso* that if before that day you have paid your debt, then the bond is to be void. There is usually attached to such a bond a paper called a warrant of attorney, by which the party signing the bond authorizes the other to enter judgment in the court against him for the full amount as soon as he fails to perform his obligations, without the formality of a suit. This act of entering judgment creates a debt of record, and gives the party in whose favor the judgment is rendered the privilege of taking the other's property for the payment of his debt.

Formerly, if you became liable on your bond, you would be compelled to pay its full amount even though it were double your real debt; but nowadays you are required only to pay the actual debt together with any loss the other party may have sustained by virtue of your delay. The purpose of giving a bond, you see, is to

guarantee the opposite party from loss, and the warrant of attorney is for the purpose of placing in his hands a means of prompt redress. These instruments give him much power over you. One should always think twice before giving a bond and warrant of attorney.

In addition to these there are a great many contracts which are usually sealed. It is always done when the parties wish to add unusual definiteness and precision to the obligation, or where they are in doubt about the presence of consideration.

8. Simple Contracts; Consideration Necessary. — Before taking up the discussion of what consideration, in fact, is, let it be emphasized that no simple contract is valid unless there be a consideration for the promise. Just why this is true it is hard to say. Nobody can answer that question with any degree of confidence. The law says the contract is worthless unless there is a consideration. Some writers think this rule is to prevent unjust bargains from being enforced in the courts. Others say the law will enforce any legal agreement if it is satisfied the parties are really agreed, and it demands the presence of consideration to satisfy it that the parties were in earnest when they made their bargain. Whatever the reason may be, a contract not under seal requires a consideration to make it enforceable.

9. Consideration must Come from the Promisee. — Consideration is said to be "any benefit to the promisor or any detriment to the promisee." The promisor is the one who makes the promise, the promisee is the one to whom the promise is made. To constitute a legal consideration the benefit must come from the promisee. I might promise to make you a present of one hundred

dollars, and X might be so moved by my generosity as to give me a farm. That would no doubt be a benefit, but it certainly would not be a consideration, and would give you no right to sue me on my promise. Or suppose I promise you to give X one hundred dollars if you promise to help X through college. That gives X no right to sue me, because the consideration did not come from him, but from you.

10. Legal Meaning of Consideration. — The exact meaning of the word "consideration" is very hard to define. It is easy to say that any benefit at all accruing to the promisor is a consideration, and likewise any detriment or injury accruing to the promisee. But these words mean a great deal, and the question as to what is a legal benefit or a legal detriment is often extremely difficult to determine. It is scarcely possible in a brief treatment of the subject to explain the full significance of what the law means by "consideration," but we may at least point out some of the things which determine its presence or absence. The consideration may consist either of a present act, such as the payment of money, or a promise to do an act in the future, *e.g.*, you promise to marry X; X promises to marry you; neither of you has done an act, and yet there is a contract — a promise is in itself a detriment in the eye of the law, because you thereby assume a legal responsibility. If the consideration be a present act, as money paid, it is said to be "executed," if it is a promise to do a future act, it is "executory."

11. Consideration need not be Adequate to the Benefit Received. — At the beginning of the discussion of consideration we are met with the query, How much consideration is necessary to make a contract valid? Must it

be adequate to the benefit received? If I agree to give you a farm worth thirty thousand dollars in consideration of your giving me one cent, there is a consideration, Would there be a contract? It seems absurd to call one cent a consideration for a farm, and yet we are strictly within the terms of our definition. We have a benefit to the promisor. The cent would be a legal consideration. The important question is not as to the amount given, but whether any real value is given. If there has been any legal benefit to one party, however small, or any legal harm to the other, however insignificant, we have a consideration.

B, for some reason not explained, wanted to weigh two large boilers which A owned. A told him he might do it if he would promise to return them in the same condition in which they were when he got them, to which B agreed. He took them all apart and, after weighing them, returned them to A without putting them together again. A sued B for breach of his contract to return the boilers in good condition. B said there was no consideration for his promise. He declared it was no benefit to him to weigh the boilers, and neither was it a detriment to A. The judges decided that it must have been some benefit to him or he would not have taken the trouble to weigh them. At any rate, they said, it was a detriment to A to part with possession of the boilers even for a moment. B might have made a very bad bargain. The cost of putting the boilers together might be very much more than the benefit he acquired from being allowed to weigh them, but that was his business. He had made his bed and must lie on it. The law will not come to the rescue of a man on the plea that he has made a bad bargain.

Suppose you hold a patent which purports to give you the exclusive right to manufacture and sell automobiles in the United States, and I agree to buy all the right, title, and interest which you have in that invention, together with all documents, patents, etc. For this I pay you a large sum of money. After I get the papers I find out that somebody else holds prior patents, and my papers are worthless. Notice just what I was buying. I was buying all the right which you had. Your rights have turned out to be very little or nothing, and yet as I got what I bargained for, *i.e.*, your right, I cannot escape from my bargain. I should have looked up the former patents before I bought. It is a safe rule always to think about a bargain before you close it. The law will not help you if you get any consideration at all. While in such cases as this the rule may seem a hardship to one party, a moment's reflection will show that a different rule would involve us in endless difficulty. It would be impossible to tell when the consideration is adequate. Some people might think it adequate, others might think it entirely inadequate. The law avoids this difficulty by refusing to consider that question. The only problem is whether any real value has changed hands.

12. What Constitutes a Legal Benefit. — The words "benefit" and "detriment," as they are used in this connection, must be understood to mean legal benefit and legal detriment. It is quite possible that the gratification of some desire of yours may benefit you personally, when the law would not deem it to be a consideration. A's father, just before his death, expressed a desire that a farm which by his will went to A, should be given to A's brother, B. A, desiring

to carry out his father's wishes, promised to convey to B. He afterward refused to carry out the agreement. When B sued him, he set up "no consideration" as a defence. The first question is, Would the gratification of A's desire to carry out his father's wishes (which he undoubtedly had at the time he made the promise) be a benefit to him? Remembering that we are considering A's feelings at the time he promised, we would unhesitatingly answer, Yes. But would there be a consideration? No, because the fulfilment of that wish of A's is not a thing of value such as the law can take cognizance of. Only a benefit that admits of some reasonably definite valuation can constitute a consideration. In another case A was continually complaining to his father that he had not received as many advantages as his brothers. His father promised to release him from a debt of one hundred dollars if he would quit complaining. A presumably quit complaining, for after the death of his father he claimed to have been released from the debt. The court said this consideration was of too vague and uncertain a character to be noticed by a court of law.

13. What Constitutes a Legal Detriment. — We have seen that if the consideration consists of a benefit, it must be a benefit of some actual value to him who makes the promise. If it consists of a detriment which the party to whom the promise is made has suffered on account of the promise, this detriment must involve some actual loss to the promisee. If he has undertaken new responsibilities this is a legal detriment, and therefore a good consideration.

In the illustration where A promised to convey a farm to B because his father wished him to do so, if B, in

consideration of A's promise, had agreed to pay a certain sum annually as rental, that promise would constitute a good consideration because it was clearly a detriment to the promisee, B, and was a detriment of actual, appreciable value.

If the promisee surrenders any legal right, even for a short time, he has suffered a loss sufficient to constitute a consideration. A, who was somewhat dissipated, was promised one thousand dollars by his grandfather, to be paid him on his twenty-first birthday, if, during the time previous to that day, he would not use liquor or tobacco. A promised and kept his word. He had definitely surrendered a right. Although its exercise would, in fact, have been detrimental to him, the court said, legally speaking, he had given up a privilege, or a benefit, and the contract was good. In the same way, if you refrain, for ever so short a time, from prosecuting your claims in the courts, you have thereby suffered a detriment. A was about to sue X. B asked him not to do so, and, in consideration of his promise to forbear suing, promised to pay him one hundred dollars. A forbore from suing, and then B refused to pay him the one hundred dollars. When A sued, B set up the defence of no consideration. A had given up his right to sue X at once. Giving up that right was a detriment to him, and therefore constituted a good consideration, and B had to pay.

14. An Agreement to do an Impossible Thing is no Consideration. — We have seen that a consideration may consist of a promise to do an act. But if the act is impossible of performance, the promise is a nullity. Suppose I agree to give you one hundred dollars, in consideration of which you agree to drink up all

the water in the sea. There would be no contract, because the performance of the promise is manifestly impossible, and, hence, the promisor was under no liability at all. He therefore never suffered any real detriment. It should, however, be noted that the impossibility contemplated by the law is physical, and not the mere pecuniary inability of the party to fulfil his agreement.

15. It is no Consideration for a Man to do that Which he is already Legally Bound to do.—In considering whether a real benefit has been conferred or a real detriment suffered, we must also take into account the existing liabilities of the parties. If one is already bound by contract to do some act, it is no legal benefit to another for him to perform that obligation, if the latter is, in any event, entitled to the performance. Suppose I owe you one hundred dollars, which for a long time I refuse to pay. At last I tell you I will pay you the full amount if you will promise to lend me your horse for a month. I pay over the money, and you refuse to let me have the horse. I sue, and you plead no consideration. Is it not a benefit to you for me to pay you the hundred dollars? No doubt this is correct in one sense, but as the hundred dollars really belonged to you before being paid over, are you legally benefited by receiving that which is your own? And as I owe the amount to you, am I legally harmed by paying that which does no more than fulfil my legal obligation? The answer to both inquiries is clear. A man cannot be said to be benefited by receiving that which is his own, or harmed by delivering over to another that which belongs to him.

Furthermore, if a man has contracted to do a certain

act, he cannot make the performance of it the consideration for a new promise. A hired a crew to go on a voyage from London to the Baltic Sea and back. Two of his crew deserted. He offered to divide the wages of the two deserters among the remaining sailors if they would sail the ship home. They accepted the offer. After they had returned, he refused to pay them, claiming there was no consideration for his promise. The court decided there was no binding contract because the seamen did no more than they had contracted to do in the first place, *i.e.* stay with the ship and sail her until she returned to the home port.

On the same principle it is no consideration for a man to perform some duty which the law imposes upon him, even though he may not have made a contract to perform it. Suppose I am interested in the prosecution of a criminal. You are summoned by the court as a witness. I promise you that if you will come, I will pay you for the time you lose from your business. Can you enforce that promise on my part? You cannot, because you were bound to come and testify anyway, and therefore your agreement to do so was no consideration for my promise to pay. If, however, the person so bound performs duties other than those which he is by law compelled to perform, then he has given a consideration. A policeman who had performed extraordinary duties while assisting in the capture of a criminal for whose arrest a reward had been offered, claimed the reward. It was contended that he had done no more than the law required him to do, and was therefore not entitled to receive it; but the court said he was, inasmuch as he had performed services over and above his regular duties.

16. It is no Consideration for a Man to Refrain from doing What he is by law Forbidden to do. — Not only is it no legal benefit for a man to perform his obligation; it is also no legal harm for him to refrain from doing something which he is forbidden to do by law. A declared his intention of assaulting X. B offered him ten dollars if he would relinquish that intention. He accepted the offer. There was clearly no consideration there, for A relinquished no right. He merely promised not to do what by law he was prohibited from doing. A promise to forbear from doing any act which is contrary either to the common law or to statute law is a nullity.

17. A Payment of a Part of a Debt is no Consideration for a Release of the Whole. — Sometimes it happens that a man will discharge a part of his legal obligation and receive from the other party a promise that no further payment will be demanded. The question then is, whether the payment of part of a debt is a sufficient consideration for the release of the whole. Suppose I owe you one hundred dollars, which I declare I am unable to pay, but offer to give you seventy-five dollars at once if you will accept it in full discharge of the entire debt. You, thinking you will never get any more, accept. Subsequently, when I get hold of some more property, you sue me for the other twenty-five dollars. I rely upon your agreement not to demand the remainder of my debt over and above the seventy-five dollars which I paid you. You contend there is no consideration for this agreement. Assuming that you had despaired of getting anything at all, the question might arise whether it is not a real benefit to you for me to pay you seventy-five dollars. We should have to

answer, No, for the same reason we gave in the previous illustrations. You are legally entitled to one hundred dollars; it is no legal benefit for you to receive seventy-five dollars. If, however, the release of the remainder of the debt is made under seal, it will bind. This rests upon the rule above stated, that a gratuitous promise is binding if made under seal.

18. Where the Debt is paid with Something Different from Money the Release is Binding. — In the illustration where the debtor paid seventy-five dollars and received a release for a debt of one hundred dollars, the payment of seventy-five dollars discharged only that amount of the debt; there was therefore no consideration at all for the release of the remaining twenty-five dollars. But the debtor may pay his debt with something different from money; if, in the above illustration, I offer you a horse worth seventy-five dollars in full satisfaction of my debt of one hundred dollars, and then you sue me for the remaining twenty-five dollars, you have received a consideration for your agreement not to claim the other twenty-five dollars. Your consideration is the horse.

The difference is that in this case I give you a thing or chattel whose value is not exactly determinable. You have paid one hundred dollars for a horse worth seventy-five dollars, but that is your own affair. The law will not look to see whether you have made a bad bargain. As it is not possible to calculate exactly the value of the chattel delivered in payment of the debt, it might be that one of the parties would consider it to be worth the full amount; so in all such cases, the contract to release the remainder of the debt is held to be binding. Even where the chattel is sold for an

exorbitant price, that fact will not prevent the contract from being valid. But where the transaction is a purely cash one on both sides, there cannot be said to be any consideration for the release of the balance unpaid.

19. Where a Number of the Creditors of a Debtor agree to accept Part of their Debts in Satisfaction of the Whole, the Agreement will Bind. — We have seen that where a single creditor accepts a portion of his debt in satisfaction of the whole, he is not prevented from claiming the remainder at some future time. The situation is different, however, when several creditors mutually agree to release the debtor from all future claims in consideration of the payment by him of a certain percentage of all his debts. If A, B, and C are creditors of X, who is insolvent, and each one agrees to accept fifty cents for every dollar of his debt, and to release the debtor from all further claims, this agreement is called a composition of creditors, and is binding.

It is perhaps rather difficult to see how this case differs from the one given above, where a single creditor accepted seventy-five dollars in satisfaction of a debt of one hundred dollars. The argument that there is no consideration for the release of the remainder of the debt would apply here as between any single creditor and the debtor; yet the law says there is a consideration, because each creditor has received, in addition to his fifty cents on the dollar, a promise from each of the other creditors joining in the agreement, that he will claim nothing beyond that per cent. So each one has been benefited, because he has received that which he would not have had unless these mutual promises had been made. This reasoning is open to the objection that the consideration, namely, the mutual promises

of the creditors, did not come from the promisee, the debtor in this case. Theoretically, this would seem to be a fatal objection to the validity of the contract, although some writers think that the consideration does come from the debtor, inasmuch as he probably was instrumental in procuring the mutual promises of the creditors. This seems to be rather doubtful reasoning. Whether or not it can be justified on principle, it is, nevertheless, true that a composition of creditors is held valid.

20. An Acceptance of a Certain Sum as a Compromise of a Disputed Claim is a good Consideration. — Remembering that where a debtor pays a part of an ascertained debt, a single creditor's promise to release him from the remainder of it does not bind, suppose a case where the amount of the debt is in dispute between the parties. Suppose the creditor thinks it is one hundred dollars and the debtor thinks it is fifty dollars. In order to avoid the trouble and expense of a lawsuit, the creditor agrees to accept sixty dollars and give the debtor a receipt in full, which he does. Afterwards, both parties discover that the real amount owed was one hundred dollars. The creditor then seeks to recover the remaining forty dollars. The debtor contends that he has been released from his obligation, by virtue of the creditor's promise not to demand more than the sixty dollars which was paid. The creditor contends that there was no consideration for his promise. The situation here differs somewhat from that previously considered, inasmuch as the parties were in dispute over the amount of the claim. The agreement of the debtor to pay sixty dollars when he thought his claim amounted to only fifty dollars, and thus avoid litigation, which would be

troublesome and expensive to both parties, is sufficient consideration to support the creditor's promise not to demand the other forty dollars. A compromise of a disputed claim is always valid. The creditor accepts a definite for an indefinite amount.

21. Real Test is whether any Actual Value has changed Hands. — After reading the preceding paragraphs, we can see that the real question in all these cases is whether any real value has passed between the parties. These illustrations do not pretend to show what particular acts or promises will amount to a good consideration, for it would be impossible to enumerate them in a book of this character. They aim to present the essential features of what the law calls consideration. It is impossible to lay down any test by which you can always determine the presence or absence of it. We must judge each case by the peculiar circumstances which surround it. If the court is of the opinion that a real value has been given in return for the promise, or that an actual detriment has been suffered on account of it, the contract will be held binding.

22. A Past Consideration is No Consideration at all. — Up to this point we have been seeking to throw light upon the essential nature of consideration. We now approach the question from a little different standpoint. We do not ask, What is consideration itself, but, When was it given to the promisor? The point here insisted upon is that the consideration must have been given in view of, and on account of, the promise. It has been shown that the consideration may be either executed, that is, present; or executory, that is, future; but if the benefit consists of some value given in the past, before the promise was made, it is not a consideration,

because it could not have been given on account of the promise.

A, who was a resident of Massachusetts, owned property situated in Texas. During a great freshet this property was in imminent danger of being destroyed. B, a friend of A's, spent much time and money in strengthening the dikes of the river, and through his efforts A's property was saved from destruction. Shortly afterwards, A having appeared upon the scene, B gave him an itemized account of the expenses which he had incurred, and this amount A promised to pay. Subsequently he refused to carry out his agreement and B brought suit. A pleaded no consideration. At first thought one would say, "Clearly there is a consideration, for A has received a benefit, and certainly B has suffered a detriment." But consider the condition of affairs at the time the promise was made. B had already completely performed the services. He did nothing in consideration of A's promise. It was therefore gratuitous and was not binding. While B's performance of these services for A created a motive for the promise, it did not constitute a consideration, because it was not done on account of, and in view of, the promise. The real question in this class of cases is whether the promisee has changed his position, that is, has given value or suffered loss on account of the promise of the other party. If he has not, then he cannot be said to have given consideration.

A sold B a horse. After the money had been paid over, and B was about to lead the horse away, he asked A if he would warrant him to be sound. A replied that he would. The horse turned out to be unsound. B sued A on the contract of warranty. A said there

was no consideration. It was contended that the sale of the horse was a sufficient consideration for the warranty. This would have been true had the warranty been made before the bargain was consummated, but here the sale was completed before anything was said about the soundness of the animal. The warranty could not have been given in consideration of the sale, because the bargain was made and the parties fully bound before the question of the warranty was introduced. The consideration, therefore, being past, was in reality no consideration at all, and B could not recover for the breach of the warranty.

In cases where services have been performed prior to the making of the promise, there is no consideration for the agreement to pay. A was running for Congress in New York. B, a political friend, labored assiduously in his behalf and spent money amounting to five thousand dollars for traveling expenses, etc. A was elected and, upon B's presentation to him of a bill for his expenses, promised to pay the amount. Upon the foregoing principles you can readily see that there was no consideration, and therefore no contract.

23. A Past Consideration will support a Promise if it was performed at the Express or Implied Request of the Promisor. — A benefit which is conferred by one party upon another before the time when an agreement is entered into between them, and before there is any thought of such a contract, is, as we have seen, a mere gratuitous benefit. It cannot, therefore, ever constitute a consideration. But if, while no contract had been entered into prior to the giving of the consideration, the consideration had been conferred upon the one party by the other at his request, the case would

differ somewhat from those we have been considering. It does not seem just to excuse a man from a promise which he has made in consideration of some past benefit, when that benefit was conferred upon him at his own request. Consequently, a rule of law has developed which holds that if a past consideration has been given at the request of the promisor, it is a sufficient consideration to render a subsequent promise valid and binding.

In a case which was decided in England in 1615, B, who had killed an Irish political leader and who had been indicted for murder, asked A to procure for him a pardon from the Crown. A traveled all over Great Britain at a great expense in performing this request, and finally succeeded in procuring the desired pardon. B then promised to reimburse A for his expenses. That which we have referred to as a past consideration may be defined to be a gratuitous act, performed prior to the making of the promise. But in this illustration could you say that A's efforts to do what B had expressly requested him to do were gratuitous acts? By a gratuitous act is meant an act done without expectation of reward, *i.e.*, if I do some act for you without any request on your part, either express or implied, I do it gratuitously, even though I may have a secret belief that you will pay me. In this case the act was not done gratuitously because B had asked A to perform it, and, in contemplation of law, had at that time impliedly promised to pay. His subsequent express promise was only putting into words what he had before agreed to do by implication. Therefore the promise was held binding.

Not only is a past consideration, performed at the

express request of the promisor, a good consideration, but it is also sufficient to support a contract if it was performed at the implied request of the promisor. If you permit another to perform some service for you, under such circumstances that no reasonable man would think he was intending to do it for nothing, you will be compelled to pay him a proper amount if you subsequently promise to do so. By permitting him to do the work without protest on your part, you impliedly requested him to do it.

24. A Promise to pay an Unenforceable Debt is Binding.—

We now come to a class of cases involving a past consideration which differ slightly from those we have been discussing. There is a statute in every state in this country providing that if you do not prosecute your claims within a reasonable time, stated in the statute, you will not thereafter be permitted the aid of the courts in so doing. Now, suppose you owe me a debt which I am unable to collect, by virtue of the fact that a time longer than the statutory period has been allowed to expire. I come to you and request you to pay your debt, although I am aware that I cannot compel you to do so. You then promise to pay me. The question is, Can that promise be enforced? The authorities are uniform that it can. How do we escape the rule that where the consideration is past it will not support the promise?

There are two explanations offered. The first is, that the promisor is morally bound to pay the debt, even though it be barred by the lapse of time, and the promise to do what one is morally bound to do, is based upon a sufficient consideration. The second explanation is, that a promise made under such circumstances

does not create a new obligation, but merely revives the old debt and so no new consideration is necessary. The old consideration revives together with the old debt. The latter is probably the true view. A moral obligation, as it is called, is not generally thought to be sufficient to support a promise.

A promise to pay a debt which is unenforceable by virtue of any defence interposed by the policy of the law, is a binding promise. The original debt is revived in its full vigor. As illustrations may be mentioned a subsequent promise to pay a debt barred by the statute of limitations, which we have discussed; a promise to pay a creditor the full amount of a debt from which the debtor has been discharged by bankruptcy; and a promise, after one becomes of age, to pay a debt contracted during infancy.

25. A Moral Consideration is not Sufficient to bind a Contract. — We referred above to what is known as a moral consideration. If a man is morally, though not legally, bound to pay a sum of money, and promises to pay it, his promise is said to be based upon his moral obligation to do that which he has agreed to do. There has been much discussion whether a promise so made can be enforced.

A, who was the guardian of B, expended a large sum of his own money in improving property belonging to B, the ward, so that he was able to sell it at a high figure. B subsequently promised to pay the amount, but afterwards refused to do so. A had voluntarily done B an act of kindness; by the judicious expenditure of his own money he had saved a large sum to the ward without making the latter's estate legally liable to repay him. B was certainly bound by all the

principles of morality to repay such fidelity. And since he had promised to pay, it was very strongly argued that his promise, coupled with the moral obligation, should be enough to bind him. But it was decided in a case where the facts were similar to those we have given, that a moral consideration will not support a promise. As was pointed out by the court, a contrary doctrine would remove the necessity for any consideration at all, inasmuch as merely giving a promise creates a moral obligation to perform it. If the doctrine were admitted, every one would be compelled to perform every promise which he made, whether it were based upon a consideration or not. The foregoing view is, generally, the law on the subject, although some courts, particularly in the state of Pennsylvania, are still inclined to doubt whether a moral consideration is not sufficient to bind the contract.

26. Provisions of the Statute of Frauds. — Not only must all simple contracts be supported by a consideration, but some of them, in order to be valid, must also be expressed in writing. In England and in the United States, acts of legislature were passed a great many years ago which provide that certain classes of contracts shall be unenforceable in the courts unless they have been reduced to writing. These statutes were passed "for the prevention of frauds and perjuries." It is not necessary that the contract be written in any particular manner. All that the statutes mean is that a reasonably definite recital of its terms shall be so expressed. Whether the contract be written or not, it must be supported by a consideration. But assuming the contracts in themselves to be perfectly good, there are some to be hereafter referred to which

the policy of the law deems should be in writing to be enforced by the courts. These statutes enumerate certain contracts for which written evidence seems to be particularly desirable.

27. What Contracts must be in Writing. — Without going minutely into the provisions of the statute of frauds, the most common contracts which must be expressed in writing will be briefly enumerated. If an executor or administrator (officers whose duties are to settle up estates of deceased persons) promises to pay out of his own pocket any loss accruing to the estate he is handling, he cannot be bound by his promise unless it be in writing.

Whenever one man guarantees that another will pay his debts, or if he promises to answer for the default of another in case the latter embezzles money which he is handling, or in any case where one person binds himself to be security for another, he cannot be held to his agreement unless he has bound himself in writing. A wished to borrow five hundred dollars from B. B refused to lend it to him unless C would guarantee that A would pay it. C promised that he would pay if A did not, but did not sign any written contract. When A defaulted, B was not allowed to hold C responsible.

All agreements made in consideration of marriage must also be made in writing. A, who was about to marry B, agreed to settle lands upon her in consideration of the marriage. This agreement was not reduced to writing, and as A refused to perform, there was no way to force him to do so.

We have seen that a deed for the conveyance of land must be under seal. A contract for the sale of land, or for the sale of any right in or concerning land, must

be in writing, although nothing but the deed of conveyance need be under seal. By the word "land," in this connection, we mean not only the ground, but also all buildings erected thereon.

Any agreement which provides for its future performance at a time more than one year after the date on which the contract is made, must be written, or it cannot be enforced. If A agrees to hire B, B's term of service to begin two years hence, neither party will be bound unless that agreement be written.

In some states all contracts for the sale of goods above a certain amount, usually fixed at fifty dollars, must be in writing. This provision of the original statute of frauds in England has, however, not been adopted in all the states of this country.

28. The Effect of Failure to Reduce such a Contract to Writing. — You remember that a seal makes a contract good and enforceable in itself, whether there has been a consideration or not; conversely, if a gratuitous promise is made in writing and the parties neglect to affix the seal, the paper is of no value at all. But this is not true of the cases we are now considering. In the first place, the fact that the contract is in writing does not make it good — there must be a consideration; and, in the second place, if the writing of the contract be omitted, that does not render it void. The contract itself is good, but you cannot enforce it in the courts. That sounds like an absurd statement, but there is a distinct difference between the two situations, as may be seen from a study of the following explanation.

The law of the place where a contract is made governs its validity. That is the rule everywhere. Now suppose a contract is made in France which provides

that B is to work for A for the space of five years from date. By the laws of France such a contract need not be written. Suppose the parties move to Pennsylvania in this country, B breaks his contract, and A sues him. This contract made in France is perfectly good according to the *lex-loci contractus*, i.e. according to French law. Ought it not, therefore, to be enforced in the Pennsylvania courts? That brings up the question whether the Pennsylvania statute, providing that such contracts must be in writing, means that the contract is void *per se*, because it is not in writing, or merely that the court will not allow any evidence to prove its existence, except written evidence. If it means the former, — if the statute operates on the contract itself, — then A can recover, because, admittedly, his contract is valid by French law, and French and not Pennsylvania law governs its validity. But if the statute merely lays down a rule of evidence, and means that when any contract not to be performed within a year is to be proved, no Pennsylvania court shall receive any but written evidence, then A could not recover, because, while his contract is admittedly valid, he can prove its terms in the court only by written evidence, and that he does not have. The latter is the correct view. In such a case A could not recover. So we see the effect of the statute of frauds is merely to lay down a rule of evidence for the courts to follow; it does not touch the contract itself.

CHAPTER V

REALITY OF CONSENT

1. **Necessity for real Consent of the Parties.** — We have discussed three of the five elements of contracts; namely, the capacity of the parties, the necessity for offer and acceptance, and the necessity for the presence of either form or consideration. We now take up the fourth essential element, which is called "Reality of Consent." This chapter might well be included under the heading "Offer and Acceptance," were it not for the fact that it leads us into a discussion somewhat foreign to the elementary treatment of the formation of the contract. When we say there must be reality of consent, we mean the parties must have arrived, by offer and acceptance, at a real agreement. The law will hold people to a definite, legal obligation, called a contract, if they have, by words or conduct, so expressed themselves as to create such a contract.

But suppose the agreement concerned a ship which at that time was at the bottom of the sea, or suppose one party deceives the other by false statements. In the one case there could be no contract about the ship which had no existence; in the other there ought not to be a contract, because the deceived person gave not a real, but only an apparent consent. Although the parties may seem to have agreed, their agreement may be unreal because there has been a mistake as to some

important fact connected with the transaction; or an innocent misrepresentation about such a fact; or because one party has wilfully deceived the other by making false statements to him; or, finally, it may be unreal because force or undue influence has been used to compel one of the parties to express his consent. We must discover what is meant in the law by these terms, and what effect such conditions will have upon the contract.

2. Mistake. — The first one of these elements of unreality which we will discuss is mistake. When we speak of it in this sense, we mean a substantial error about some material fact connected with the transaction into which one or both of the parties have fallen. Mistake must be distinguished from wilful deception. If the error has been brought about by the dishonesty or double dealing of either party, we have, not mistake, but misrepresentation or fraud, which we will discuss later.

We must also distinguish mistake from an error of judgment as to the advantages to be derived from the contract. In many cases one of the parties to a contract wishes that he had never entered into it before he has finally fulfilled his obligations under it. He may perhaps have made a mistake as to the profits which he was likely to realize, but such a mistake will not release him from his obligations. We must also exclude a mistake of law. Such an error is no ground for releasing either party from his agreement. It should be emphasized that in order to affect a contract the mistake must be about a positive fact.

3. Mistake of Judgment distinguished from Mistake of Fact. — As has been indicated, an error in judgment is not a mistake which will in any way affect the validity

of the contract. Suppose you have learned a little about diamonds and, under the impression that you are an expert at selecting fine stones, you go into X's store to purchase a ring. In examining a tray of paste diamonds you see among them a stone which you are convinced is a real diamond of the finest water. Under the belief that the stone is worth one hundred dollars, you offer X ten dollars for it, and he accepts. You subsequently find it to be worth fifty cents. You cannot draw back from your agreement to pay ten dollars for it. You trusted to your own judgment, and you were deceived. You merely cheated yourself.

4. Mistake as to the Intention of the Opposite Party. — We have seen that no error in judgment will relieve you from the obligation of a contract into which you have entered. No matter how much you may have missed the true value of an article which you were buying, if you bought it relying entirely upon your own judgment, you are bound. But, again, we must distinguish such an error in judgment from a mistake as to the intention of the opposite party. In the last illustration, if you bought the stone relying entirely upon your own judgment as to its value, the fact that X may have known the stone not to be a diamond, and that he may have known that you thought it was, would not change the matter. As long as X did nothing to deceive you, we are not interested in what he thought, for you were not relying upon what he thought; you were relying upon what you yourself thought. But, on the other hand, if you buy the stone under the impression that X has warranted it to be a diamond; if you think he is selling it to you for a diamond, when in reality he knows it is not a diamond and does not

intend you to think he is selling it as such, there you have made a real mistake — you think he is promising you a diamond when he is not. You have made a real mistake as to the intention of the opposite party — the state of his mind is a fact about which you have fallen into error and the contract is of no validity.

A went to B to buy oats. He wanted old oats, and thought the oats he was buying were old; subsequently he found them to be new. He then refused to carry out the contract. The lower court said there was no contract if “A thought he was buying old oats.” You can see that this was not a correct statement of the law from the illustrations we have had. His mistake was an error in judgment, for which he had only himself to blame. Accordingly, when the case was appealed to the upper court, they reversed the decision, saying there was a contract unless A thought B was promising him old oats, thus laying down the rule given above.

5. Mistake as to the Existence of Subject-matter. — We will now discuss briefly some of the more common kinds of mistake, which are real mistakes of fact and which do affect the validity of the contract. Such a mistake often occurs about the existence of the subject-matter of the agreement. A sold B a cargo of corn which both parties supposed to be on board ship going from Salonica to England. As a matter of fact, the grain had become heated, and had been sold at Tunis for what it would bring. Here was a mistake as to the existence of the thing about which the agreement was made. Therefore there was no contract. A similar case occurred where the owner of an opera house agreed to lease it for a lecture; at the time the agreement was made the opera house was not in existence, having been

burned down the night before. The contract, being founded upon mistake, was of no validity, and gave rise to no action of damages on the part of the lecturer on account of his inability to give the lecture and his loss of the expected admission receipts.

6. Mistake as to the Identity of the Subject-matter. — The mistake into which the parties fall may be an error as to the identity, instead of as to the existence of the thing about which they are contracting; the same principles will apply in both cases. When two parties are endeavoring to agree about one thing, but, owing to a mistake of one or both of them, their words imply an agreement about something else, the mistake is just as fatal to the validity of the contract as the one we have previously described. A sold B a cargo of cotton, to arrive on the ship *Peerless* from Bombay. There were two ships of that name sailing from that port. A meant one, B meant the other. There was no contract because the parties made a mistake as to the identity of the thing about which they were contracting.

7. Mistake as to the Identity of the Contracting Parties. — There may also be a mistake as to the identity of the persons with whom you are contracting. The consent of the parties, as expressed in the offer and acceptance, must be entirely free from all such errors, or it is not real consent. If you contract with one man, thinking he is some one else, you have given no real consent, because you did not intend to contract with that individual. X had been accustomed to supply B with ice. X sold his business to A, who opened the mail addressed to the firm and supplied B's orders. After B discovered with whom he was dealing, he refused to pay. It was decided that he was not obliged to do so.

There was no contract, because one party was mistaken as to the identity of the other. If, however, B had accepted the ice and used it, after knowing who had supplied it, he would have been compelled to pay for its value, although he would not under any circumstances have been compelled to pay according to the contract, for there was no contract. He could be held liable only, if at all, upon another principle which we will not attempt to explain here, which is called the principle of "Quasi Contract."

8. Mistake as to the Character of the Transaction. — Another class of mistakes is where one or both parties is in error as to the nature of the contract into which he is entering. If you sign a paper which you think is an indorsement of a candidate for public office, but which you subsequently discover to be a promissory note for a large sum of money, you have not really entered into any contract, because you never consented to sign a promissory note. If, however, you were careless in signing a paper which you had not read, and if the question as to who should be the loser arose between you and another party equally innocent, you would probably have to suffer.

B, a very old man who was scarcely able to see, signed a paper which he was induced by another party to believe was a receipt. It was in reality a bill of exchange. This is what is known as "negotiable paper," and was transferred to a third party, A, who sued B. Here there was no fault in either of these two parties, A or B. There was a pure mistake, *i.e.* B had made an error, not induced by his own negligence, as to the character of the paper he was signing. A was not allowed to recover in this case, as B was held not

to have contracted to pay. There was a mistake as to the character of the transaction. If there had been the least evidence of negligence on the part of B, A would have been allowed to recover, but it was thought that under all the circumstances of the case B was not negligent in any degree. The only remedy which A would have would be a claim for damages against the man who had deceived B.

9. Effect of Mistake upon the Contract. — As we pointed out at the beginning of the subject of contracts, the essential elements of a contract must be present or no binding agreement is created. One of these essential ingredients is, that the consent expressed by offer and acceptance must be a real consent. If the expression of agreement be not the one which was intended by the parties, — that is, if one or both parties make a mistake as to some vital part of the transaction, — the whole contract falls to the ground for the want of one of these essential elements. Mistake renders a contract void, or it is, perhaps, more correct to say that there never was a contract, on account of the absence of one of the essential elements.

10. Unrealities of Consent which do not absolutely Vitate the Contract. — Mistake, however, is only one of the unrealities of consent. The other forms of unreality differ from it in a very essential particular. The agreement may be so unreal as utterly to fail to create a contract. This is the case if there has been a mistake. It is possible, however, that it may be a shade less unreal, in which case the contract does come into existence, but the unreality of agreement gives one party an opportunity to escape from his obligation if he desires to do so. We have seen that if A sells B a

ship-load of corn then at the bottom of the sea, there is no contract at all. But if A sells B a ship-load of corn which he says is first grade, when it is spoiled, there is a contract; although if A has told B a lie about the subject-matter, it seems reasonable to allow B to avoid the contract if he sees fit, whether or not B knew what he said to be false. In the one case he would be guilty of misrepresentation; in the other of fraud. Likewise, if one man forces another to sign a paper at the point of a pistol, or if one party be unduly influenced by the other, the contract can be set aside. These are all examples of unreality of consent, which do not, by their presence, vitiate the contract in its inception, but give one party a loophole by which to escape after the contract is complete.

11. Misrepresentation. — We will take up these various kinds of unreality and discuss each one separately, first considering what is known as “misrepresentation.” One naturally thinks of misrepresentation as describing a wilful falsehood, but the word is not so used in this connection. It is applied, for want of a better term, to misstatements of fact made by one party to the other without wrongful intent, *e.g.* I sell you a bar apparently of gold, which I really think to be gold, and so inform you. It turns out to be brass. There I was guilty of no wrong, and yet the contract may be set aside. The term “misrepresentation” is used to describe innocent misstatements as contrasted with “fraud,” a term which is used exclusively to describe wilful and malicious or careless lying.

12. The Question is whether the Misrepresentation is Part of the Contract. — It being conceded that the false statement was innocently made, the problem which the

courts have to solve is whether the representation was or was not of such a character as to give one party the right to rescind. The representation may be of such a nature as to form an integral term of the contract, or it may be too trivial to be considered a part of it, or again it may be an important representation but collateral to and not part of the agreement. If I sell you a stone which I honestly believe to be a diamond, and which I sell to you as a diamond, but which turns out to be glass, all would agree that the representation is a part of the contract. But if I sell you a horse, representing to you that his left hind foot is white when it is the right foot that is white, probably no man would seriously contend that the contract should be avoided for that reason.

Between these two extreme cases we find many instances where it is very difficult indeed to tell whether or not the representation is intended to be an integral part of the contract. A sold hops to B. Before he closed the contract B inquired if any sulphur had been used in the cultivation or fertilization of the hops, as they would be worthless for his purposes if any had been so used. A replied that none had been used. It was afterwards discovered that A had, by way of experiment, used a small quantity of sulphur on a quarter of an acre of his hop field, he having entirely forgotten the circumstance. The sulphur-raised hops, being mingled with the rest, spoiled the whole for B's purposes. He repudiated the contract. The court decided he could do so, since he had contracted for hops untainted by sulphur, and failed to get what he bargained for.

13. Representations which are Part of the Contract distinguished from Warranties. — In this class of cases it is

often very difficult to ascertain whether the representation made by one of the parties is intended to be a term of the contract or is in the nature of a collateral agreement termed a warranty. If I sell you a horse, and it is expressly stipulated that the contract of sale shall be void if the horse is not sound, the representation that the horse is sound is one of the essential elements of the contract because it is involved in the consent of the parties. If, however, I make an absolute sale of the horse to you, but warrant him to be sound without providing that the contract may be rescinded, then if he is found to be unsound, you cannot repudiate your bargain. In the one case, the representation of the soundness is part of the contract; in the other there are two contracts, one providing for the sale of the horse, the other providing that he shall be sound. If the warranty of soundness be broken, you may sue me for damages for the breach of that contract of warranty, but the contract of sale remains untouched. This distinction is very important and should be carefully noted. If, in the illustration given in the preceding paragraph, it had been understood between the parties that the particular hops in question were sold by A to B, and that A guaranteed them to be free from sulphur, then B could not have repudiated his agreement. He could sue A for damages for the breach of the warranty, but the original contract would be undisturbed.

14. Misrepresentation as to Time. — Very often a stipulation is made by one of the parties as to the time when the contract is to be performed. The question then arises whether the agreement by the opposite party to perform within the time stipulated is a part of the con-

tract itself, and therefore would give rise to a right to rescind it, or whether it is a mere collateral representation which may, as has just been explained, give rise to an action for damages, but will not defeat the contract itself.

B agreed with A that his ship, which was "then in the port of Amsterdam," should proceed at once to Newport and take on a load of coal for A which was to be shipped to Hong Kong. This contract was made on October 19, 1860. B's ship was not, as he alleged, at that time in the port of Amsterdam, and did not reach there until October 23. A, to whom time was very important, then repudiated the bargain and made other arrangements. That brought up the question whether the representation as to time was an integral part of the contract, or whether it was merely a promise made outside of it. In the former case A could repudiate. In the latter he could not, although he would have a right to sue for the breach of the promise that the ship was at that time at Amsterdam. The court decided it was part of the contract that the ship was "then in the port of Amsterdam," and therefore A was allowed to repudiate.

In another case nearly similar to this one, the opposite conclusion was reached. A engaged B, an actor, to serve through the season and to arrive four days before the first rehearsal. B did not arrive until two days before rehearsal. A endeavored to set aside the contract, but the court said this promise was not part of the contract itself. It was independent of it, and its breach gave A no right to rescind.

In the one case, the representation that the ship was then in the port of Amsterdam was considered to be so

important that it became a term of the contract. If A had known that the ship was not in the port of Amsterdam at the time when he was negotiating with B, in all probability he never would have made the contract at all. On the other hand, in the latter illustration, the representation on the part of the actor that he would arrive four days before the first rehearsal was not considered important enough to be deemed a term of the contract. In all probability, if B had stated that he could not arrive until two days before the rehearsal, he would have been employed in spite of that fact. These two illustrations show how sometimes the element of time may be very important so that it becomes a term of the contract, and in other cases it is comparatively insignificant and is probably considered by the parties as a collateral stipulation. The mere fact that time is very important does not necessarily mean that it is a term of the contract, but it is very strong evidence that the parties intended it to be so.

15. Misrepresentation as to the Subject-matter. — The most common kind of misrepresentation is that relating to the character of the thing about which the contract is made. It is very easy for a man who is anxious to sell property to misrepresent it in his efforts to induce the opposite party to purchase. It would be impossible within the scope of this book to attempt to enumerate the instances or classes of such misrepresentations. The principle underlying all of them is this: if the representation is of such a nature that the opposite party bought, relying upon it, and if it is considered by the court to be a term of the contract, then it will give the injured party a right to repudiate his bargain.

16. Expression of Opinion distinguished from Misrepresentation. — There are some representations which do not in any way vary the rights of the parties, among which are representations as to insignificant facts, and those which are mere expressions of opinion and do not purport to convey any information. A sold B a horse, declaring him to be a fine traveler; he was unable to travel at a greater speed than five miles an hour. B asked to have the contract set aside, but his request was refused. A's statement was not a representation of a fact. He might possibly have thought that the horse was a fine traveler, even though his speed was slow.

In selling land an auctioneer declared it to be "very rich water meadow land." The land was not rich; there was practically no water on it, and it would require a considerable stretch of imagination to describe it as meadow land, but, nevertheless, the court said this was a mere flourishing description — a puffing of the article to be sold. It amounted to a mere expression of opinion on the part of the auctioneer, and did not vary the rights of the parties.

The representation must always stand for something definite, or the opposite party cannot take advantage of its falsity either to escape from his contract or to recover damages. It is often hard to determine when the representation does stand for a fact. A sold B a hotel. He said it was then leased to a "good tenant." The tenant was, in fact, a poor one, inasmuch as he had failed to pay the rent. It was contended that the expression "good tenant" was a mere expression of opinion on the part of A, and meant nothing more than a glowing description of the desirability of the purchase.

But the court held that "good tenant" means one who pays his rent, and refused to execute the contract.

17. Misrepresentation by Failure to disclose Material Facts. — Not only may a contract be set aside for an actual misrepresentation about a material fact, but in some instances by a failure to disclose some hidden fact. There are some kinds of contracts in which one is legally bound to disclose all material information, and a failure to do so is in itself a misrepresentation. Perhaps the most common of these classes are contracts of insurance and for sales of land. As all who have been examined for life insurance know, the applicant is expected to tell all about his previous ailments. If you have a scrofulous tendency and fail to inform the examining physician, or if you have had a certain disease which you forget to mention, you are liable to lose the benefits of the contract. You have been guilty of a misrepresentation. It is customary for insurance companies, however, to provide in their policies that, after a certain term of years, usually two or three, the validity of the contract shall not be questioned on account of misstatements contained in the application. You are bound in the same way to disclose all material facts in negotiating for marine and fire insurance.

It is also your duty to describe correctly land which you are selling. If you make perfectly innocent misstatements about it, or unthinkingly fail to give full information, the opposite party may abandon the contract. It should be again emphasized that the misrepresentation or failure, whether active or passive, must relate to a fact which is material to the contract.

18. Remedies of Injured Party. — As you have learned from the preceding pages, if the misrepresentation forms

a term of the contract, it gives the injured party a right to rescind. You have also learned that although the misrepresentation concerns a material fact, if it is only collateral to the contract, and not a part of it, the injured party cannot rescind, although he may sue for damages. In the former case he has the option either to rescind the contract or to sue for damages, as he prefers. Should he choose the latter, he may recover the loss which he has suffered by reason of the falsity of the opposite party's statement. In cases where the misrepresentation is collateral to the contract, and this action is the only remedy of the injured party, the amount of damages to be recovered is the same.

19. Fraud. — We now leave the discussion of misrepresentations which have been made innocently, and come to those which have been made with an intent to deceive. Such misrepresentations constitute what is known as fraud. Fraud consists of a false statement about a material fact, made with a knowledge of its falsity, or with a reckless disregard of its truth, and for the purpose of inducing the other party to act upon it. As we shall see, when a man is guilty of fraud he is not only likely to lose his contract, but he is also liable to be sued in an action of tort for the technical wrong called "deceit." In such a case he is responsible for the injury actually suffered by the opposite party on account of his false statement, and he may be also compelled to pay damages, imposed as a means of punishment.

20. Statement must be about a Material Fact. — We will take up the essential elements of the wrong known as fraud, and will discuss them separately. The first is that which we have discussed in relation to the subject

of misrepresentation, namely, that the statement must be a false statement about a material fact. It must not relate to an insignificant matter of fact, nor to a matter of law, and it must be more than a mere expression of opinion. I may say that a piece of land which I am attempting to sell to you is worth one hundred dollars an acre when it is worth only one dollar an acre; but even though I know its real value, that statement will not constitute fraud, because I do not pretend to be stating a fact. If, however, I state that this land has been sold to me for one hundred dollars an acre and it has not, that, being a statement about a material fact, is sufficient to constitute fraud.

21. Statement Must have been Made with Intent to Deceive. — The second essential element of fraud is that the false statement must have been made with the intention to deceive, that is, it must have been more than a gratuitous lie, told merely for the pleasure of telling it and for no ulterior purpose. This does not mean that the statement must have been made with the intention of deceiving the party to whom it was made, but it must have been made with the intention of deceiving somebody. A sold B a gun, representing it to be safe and to have been made by a reputable firm. Both of his statements were false. The gun exploded and injured, not B, but his son, who was then using it. A contended that he could not be sued in deceit on account of an injury to the son, since he did not make the false statement to him; but the court decided against him. He intended not only to deceive B, but also to deceive the son or any other person who was to use the gun.

22. Party deceived must have acted on Account of the False Statement. — Even though the statement may have

been made with the intention of deceiving the opposite party, if he was not deceived, and therefore did not suffer damage on account of any deception, there can be no recovery of damages in an action for fraud. While the one making the false statement would, in such a case, be just as guilty as though the other had been actually deceived, yet the technical wrong of fraud is not complete until the opposite party has acted on account of the false statement and has by it been led into damage. A sold B a cannon. There was a hole in it which A concealed by filling with a metal plug. At the first discharge the cannon exploded. It appeared that B had never seen it before the explosion. He could not therefore have been deceived by A's action. This being true the court refused to hold A liable in deceit.

23. Statement Must have been Known to be False or Must have been Recklessly Made. — The last essential element of fraud is the one which is most difficult to understand. The conception of fraud involves the idea of moral wrongdoing on the part of the guilty person. Assuming the statement to have been false, and the opposite party to have been deceived, yet if the one who made the statement made it innocently, he is not guilty of fraud. The question which is difficult to determine is when he is really innocent and when he either knew the statement to be false, or deliberately shut his eyes to facts which would have disclosed its falsity to him. In the latter case he is said to have been recklessly ignorant, and is usually considered to be just as guilty as he is when he wilfully deceives. If the party knows the statement to be false, the solution is easy — he is guilty. But it is often very hard to determine whether

he has been recklessly ignorant or not. Even if he has been recklessly ignorant, but proves conclusively that he honestly believed his statement to be true; ought he to be liable for deceit? There has been a great deal of argument on this question, and even now there is not unanimity of opinion in the different courts.

In the leading English case on this subject the directors of a proposed street-railway company had issued a prospectus in which they declared they had obtained the right to run their cars on certain streets. This was false. The directors were sued by shareholders who had purchased stock on the faith of their false representations. The defendants succeeded in satisfying the jury that they were honest in their belief that they had the privileges which they claimed. It was very strongly argued that, as the directors ought to have known the truth, and had no reasonable grounds to believe they had been granted these privileges, they should be held responsible. But the court said it made no difference whether they had reasonable grounds for believing as they did or not; if they actually did believe what they said to be true, then they were not chargeable in deceit. The fact that they did or did not have reasonable grounds for their belief was declared to be valuable to aid the jury in determining whether the directors believed their own statements, but otherwise was thought not to be material. That is the English view.

The American view seems to vary slightly from it. The American courts are inclined to say: If a man makes a declaration false in fact, he makes a statement which he does not know to be true; and if he makes it without reasonable and probable grounds to believe

in it, then he is recklessly ignorant as to its truth or falsity, and should be held liable just as much as in cases where he wilfully lies. The latter view is the correct one. It works substantial justice in more cases than the other, for it is extremely difficult or impossible actually to determine the state of mind of the party charged with the fraud. As has been so often expressed by the courts, man's motives must be judged from his acts, God alone being capable of reading his mind; consequently, the American view, which assumes that a man is not honest in his statement if he makes it without any reasonable grounds for believing it to be true, is the better rule of the two.

24. Remedies of the Injured Party. — It remains to consider the effect of fraud upon a contract. Just as misrepresentation, when it is a part of a contract, destroys its binding force, so will fraud render it voidable, *i.e.* the deceived party may at his option carry out the contract and charge the other party for the loss he may have sustained, or he may repudiate it altogether and rely upon a suit for damages for redress. He must, however, be prompt in coming to his decision, and doing one thing or the other. If, after he is fully acquainted with all the circumstances of the fraud, he is satisfied to go on with the contract, and so informs the other party, the contract may be said to have been ratified, and may not thereafter be rescinded. If he decides to sue for damages, he may recover any loss which he may have sustained, provided it might reasonably be expected to result from the fraudulent statement. These are his remedies under the contract. If he does not wish to avail himself of either of them, he may, in an action of tort, recover damages not only

for the loss he has sustained, but also what are known as punitive damages, which are awarded, not only to compensate the injured party but also to punish the guilty one.

25. Duress.— Another form of unreality of consent which sometimes renders a contract voidable is what is known as duress. Duress consists of any actual or threatened violence offered to a man, or to any member of his family, in order to force him to enter into a contract. If he does enter into an agreement under such circumstances, he is said to contract under duress, and he may avoid the contract so made if he desires to do so. It is very clear that there is in such a case no real consent. The will is overpowered by a fear of injury, just as in the case of fraud or misrepresentation the judgment is deceived. In both cases the consent is only nominal, not real.

26. Undue Influence.— Very nearly akin to duress is undue influence. This consists of influences of various kinds brought to bear upon a man to make him do something of which his better judgment disapproves. It is much harder to prove than duress, because it is more insidious. The most common instance is in the case of a testator making a will. While a will is not a contract, the principles relating to undue influence are the same as applied to both; and cases where undue influence is alleged as a means of attacking the validity of an instrument arise far more frequently in the case of wills than in the case of contracts. It frequently happens that some near relative or friend will so work upon the feelings of an old, and perhaps feeble man, as to induce him to make a will or sign a contract of which his sober judgment would not approve. The difficulty in

such cases is, first, to prove the influence; and, second, to determine when proper influence ceases and undue influence begins.

Undue influence is usually defined to be such as overpowers the volition, without convincing the judgment. As a general rule, the party seeking to set aside the instrument on the ground that one party to it was unduly influenced must allege and prove the undue influence. In certain classes of cases, however, the burden of proof is said to shift, and the duty of proving that there has been no undue influence falls upon the defendant. If a child makes a sale of land to his father for a very inadequate consideration and the transaction is attacked, the father would probably be called upon to show that the child had had independent advice and was not unduly influenced by him. The same rule holds true whenever the court thinks, from the nature of the transaction, that a presumption of undue influence has arisen. Undue influence, like fraud and duress, renders a contract voidable at the instance of the injured party.

CHAPTER VI

LEGALITY OF OBJECT

1. Necessity for Legality of Object. — All the elements of a contract thus far discussed may be present, — the parties may have been capable of contracting, they may have expressed their agreement in the proper form, a valid consideration may have been given, and the consent so expressed may have been a real consent,—yet the contract will not be good unless the objects contemplated by it are legal. By this we mean that the purpose of the contract must be a proper and lawful one. In general, all contracts are deemed legal. Every one is at liberty to enter into an agreement with some one else, if he chooses to do so. Those contracts only are illegal which are forbidden by the law. Just as we discussed the incapacity rather than the capacity of the parties, so we must now discuss illegality instead of legality of the object, for illegal objects are far less numerous than those which are legal. The objects of a contract may be illegal because they are forbidden by statute law, or because they are contrary to the common law.

2. Objects Forbidden by Statute. — Sometimes an act of legislature or an act of Congress forbids certain contracts to be made. We shall not attempt to name the various statutory prohibitions which have been imposed, as it would be quite impossible to do so. The statute may forbid a certain class of contracts to be made, or it

may declare that if made they shall be void, or it may impose a penalty upon all persons who enter into them. In the last case the contract itself is valid, although the parties who entered into it will be compelled to pay the penalty. But if the statute either forbids the contract to be made, or provides that it shall be void, no rights can be acquired under it.

3. Effect of Illegality upon Collateral Transactions. —

The reason for making a distinction between contracts which the statute declares to be void and those which it forbids, is the different effect upon other contracts growing out of them. A contract forbidden by a statute is not only void in itself, but it is so tainted with illegality that other contracts, perfectly innocent in themselves, may also be void if they are in any way connected with the forbidden contract. On the other hand, if the contract is merely declared to be void by the statute, it is not, strictly speaking, illegal. Other contracts growing out of it are not void simply because they have some connection with it.

For instance, in England a statute has been passed which provides that wagering contracts shall be void. If A makes a bet with B, loses, and pays his bet with a promissory note for one hundred dollars, that promissory note would be valid, although it was given in payment of a debt arising from an illegal contract. But if the statute had forbidden any wagering contracts to be made, then the promissory note would be void as well as the contract itself. In some states in this country statutes have been passed which provide not only that wagering contracts shall be void, but that all contracts, like that mentioned, arising out of them shall be void also. In such a case, obviously,

neither of these contracts would have conferred any rights on any one.

4. Objects contrary to the Common Law. — Not only may contracts be void because they violate a statutory provision, but they may also be void because they are contrary to the rules of common law. Any contract to commit a crime or to do a civil wrong is absolutely void. A hires B to commit murder. After the commission of the crime it is very clear that B can not claim his compensation from A in a court of law. The result will be the same if A has hired B to rob a house or to bribe, or to commit any offence which is recognized by the common law as a crime or misdemeanor.

5. Agreements contrary to Public Policy; Immoral Agreements. — There is another class of contracts which are void because they are contrary to the common law, though their opposition to it is not nearly so easy to determine. This class embraces those contracts which are said to be contrary to "public policy." "Public policy" is a term which is extremely difficult to define. Anything which is detrimental to the public welfare is deemed contrary to public policy, and, as may readily be surmised, this term is extremely elastic and capable of innumerable interpretations. There are, however, several classes of agreements which are generally recognized as being contrary to public policy, and are void for that reason. Immoral agreements constitute one of these classes. No explanation is necessary to illustrate what is meant by this term, for the name explains itself. Any agreement which, though it does not contemplate a crime or misdemeanor, has for its object a purpose generally recognized to be contrary to good morals, is void.

6. Agreements tending to defeat Justice. — There are some kinds of agreements which have a tendency to defeat justice. Such agreements are contrary to public policy because they are said to “pervert the course of justice.” If two men agree to refer all matters in dispute which may hereafter arise between them to arbitrators to determine, instead of going to a court of law, such an agreement is void. It is void because it removes disputes arising between them from the proper place where such disputes should be determined, that is, the courts, and takes them to a tribunal created by the parties themselves. Two parties may make a valid agreement to refer a particular dispute to arbitrators to decide, instead of going to law about it, and such an agreement will bind them so that neither can recover in a suit. But an agreement to refer all matters to arbitrators is considered to be contrary to public policy because it “ousts” the jurisdiction of the courts.

On the same principle, any agreement to conceal your knowledge of a crime which has been committed, or to secrete witnesses, or to prevent criminals from being brought to justice, or to do any act which in any way tends to hinder or delay the courts in their work in deciding litigation or in bringing criminals to justice, is void.

7. Agreements tending to promote Litigation. — Any agreement which has for its object the promotion of litigation in the courts is void. The policy of the law is against allowing men to stir up trouble merely for the pleasure of having disputes. If a man has been injured, and is in good faith seeking redress, he will receive the assistance of all the machinery of justice.

But if he is attempting to arouse quarrels among his neighbors, either for the mere pleasure of doing it, or for the hope of ultimate gain to himself, he cannot invoke the assistance of the courts.

If you have been injured through the carelessness of an engineer employed by a railroad company, you may sue the railroad and recover damages. But you cannot sell your right to sue to some one else. This may seem, in one sense, like a hardship, because very often poor people are injured who have no means with which to employ counsel to enforce their claims. But if it were permitted for one man to sell his bare right to sue to another, we should soon have speculators whose only business would be to go about the country ascertaining who had been injured, buy their claims for small amounts, and then sue those who had been responsible for the injuries. This objection to the rule forbidding the sale or assignment of a right to sue is not so strong as formerly, since "contingent fees" are now sanctioned by the courts. A man without means who desires to sue for damages, on account of injuries which he has received, is permitted to make a contract with an attorney by which the latter is to receive a certain percentage of the amount recovered. This arrangement permits a poor man to employ the services of counsel when he has no money to pay his fee.

It sometimes happens that property is sold which has been injured through the wrongdoing of some one else. If you are the owner of a valuable horse which has been injured by a wrongful act of X, and you sell a number of horses to me, among which is the injured one, I may sue X for the injury done to the horse which now belongs to me. You may sell to me a right to sue

under such circumstances. The distinction between this case and the other is that here you do not sell the mere right to sue, you sell the horse; the right to sue goes with the purchase. As a general rule, any agreement which tends to promote litigation is void.

8. Agreements in Restraint of Marriage. — Any agreement which tends to restrain the freedom of marriage is void. The policy of the law is in favor of marriage, and anything tending to prevent it is therefore contrary to public policy. A promised X, under seal, binding himself by a penalty of one thousand dollars, that he would marry no one but her. The contract was held void because it had a tendency to promote celibacy. In the same way, any agreement which tends to separate husband and wife, or to prevent their living together again, if already separated, is void. A in his will provided that fifty dollars a week should be paid to his daughter so long as she should live separate from her husband. Even though it be given by a will, which is construed much more liberally than a contract, such a gift is invalid because it holds out inducements to the wife to live apart from her husband.

9. Agreements in Restraint of Trade. — If two or more parties enter into any agreement which has a tendency to restrain the freedom of trade, such an agreement is void. A, who was a manufacturer of machinery, sold his business to B, conveying to him the good-will as well as the plant, and agreed never again to engage in a similar business. The agreement was held void as being contrary to public policy. Waiving for a moment the discussion as to the correctness of this decision, we may observe that it is always proper for a man in selling the good-will of his business to agree not to engage

again in the same business in the same place, or within a reasonable distance therefrom, or perhaps not at all within a limited time. This would be necessary in order to protect the purchaser. But, under ordinary circumstances, an agreement never again to engage in the same business is thought to be an agreement in restraint of trade. Suppose, however, that you are a manufacturer of a peculiar kind of rifle, which is produced by no other manufacturing company in the world. You therefore supply the markets of the world; suppose you sell your business, with its good-will, to me; my purchase would be valueless, if you, with all your experience and your intimate association with the governments who were your purchasers, should again engage in the same business and compete with me. Under such circumstances, an agreement by you that you would never again engage in the same business, would be binding. No precise rule can be laid down with regard to this question. The courts will always examine the facts of each particular case and endeavor to ascertain whether or not the agreement be a reasonable one.

Perhaps the kind of agreement in restraint of trade which is now occupying public attention more than any other, is the agreement which tends to promote a monopoly and to stifle competition. The combinations of capital familiarly known as trusts, which have for their object the promotion of the interests of the various contracting firms and the prevention of competition by outside parties, are contrary to the common law because they are in restraint of trade. Contracts between these various firms, which have for their object the promotion of monopolistic interests, are void as between themselves; yet, inasmuch as all the parties

of the contract are willing to perform it, and it is to their own interest not to break it, it is impossible to prevent such combinations under the present laws. Congress has under advisement at the present time a project to pass a bill drafted in such a form that it will be possible to prosecute criminally the officers and members of corporations or firms which enter into such contracts. Whether or not such a law can be successfully enforced, is perhaps a question. It is almost impossible to secure sufficient evidence to convict the offender.

10. Effect of Knowledge of Illegal Purpose. — Sometimes a contract will be entered into between two persons, one of whom is aware of an illegal purpose while the other is not. A hired a brougham to B, which was to be used for an immoral purpose; A, not having known this, sued B for the hire of the vehicle. The court allowed him to recover, saying, as far as he was concerned, the transaction was legal. This rule, however, holds good only in a case where the contract is apparently a perfectly innocent contract. Where its illegality appears upon its face, neither party has any rights under it.

SECTION II

PERSONS AFFECTED BY CONTRACT

CHAPTER I

UPON WHOM THE FORMATION OF CONTRACT MAY CONFER RIGHTS AND LIABILITIES

1. **General Rule as to Persons affected by Formation of Contract.** — In the preceding section of this book we have discussed the manner in which a contract may be created. We now assume that a valid contract has been formed, and apply ourselves to the task of discovering upon whom it may confer rights and upon whom liabilities. Having secured our contract, we wish to know what persons are bound under it and who may enforce these obligations. It may be laid down as a general proposition that the only persons who acquire rights or liabilities by the formation of a contract are those who are parties to it. The one who gives the consideration should receive the benefit, and he who makes a promise should perform it. It is possible for one man to substitute another for himself after the contract has been made; but, except in very rare instances, the persons who contract cannot vary the rights of others.

2. Exception to the Rule under Certain Conditions. — The rule above given is almost universally true. If I contract with you that I will pay X one hundred dollars, that contract confers no rights upon X, and he cannot sue me for the one hundred dollars. The English law is emphatic on this point; it says that under no circumstances can a third party obtain a right by virtue of a contract to which he is a stranger. Under most circumstances this rule is correct in America; but in certain peculiar cases it has been somewhat altered to meet obviously sensible requirements. Suppose I owe you one hundred dollars, and you owe X one hundred dollars. Your debt to X is due, and he comes and demands his money. Being unable to pay him you agree with him that instead of paying my debt of one hundred dollars to you, I shall pay it directly to X. Then you come to me, and we agree that I shall pay the one hundred dollars to X, in accordance with your arrangement with him. In consideration of this, you release me from my debt to you. In such a case as that, it certainly seems as though X should be allowed to sue me if I refuse to pay. He could not do so in England because the consideration did not come from him; but he may in most of the states in this country. In ordinary situations, the rule is that A and B contracting together can confer no rights upon C.

3. Contracting Parties cannot impose Liabilities upon Third Persons. — Although there may be some instances where contracting parties may confer rights upon third persons, the rule is perfectly well settled that two persons contracting together cannot bind, or in any way impose obligations upon, a third. This seems to be nothing more than common sense. Certainly, a man

ought never to be bound by a contract to which he was a stranger and to which he gave no consent.

4. Third Persons may not interfere with a Contract. — Although the formation of a contract between two individuals cannot confer obligations under that contract upon a third party, it does impose upon all other persons the duty of non-interference with the relation thus established. You will remember in the introductory chapter upon the subject of contracts, it was stated that the contract is a legal relation established between the parties. It is a thing in itself. That legal relation, or contract, is a thing of value. If any third person disturbs it by any improper means, he has been guilty of a wrong—he has interfered with the property of another. If A is under contract to work for B for the space of one year, and X maliciously induces him to leave B's employment before the year is up, there is no doubt that he would be liable in damages. Some authorities limit the remedy to cases where improper influences, such as threats, or violence, or false statements, have been used. Others intimate that the purpose must be the malicious intent to injure the plaintiff. The precise limitations of the rule may, perhaps, be somewhat uncertain; but, in general, inducing a man to break his contract with another is, under most circumstances, a wrong for which redress may be obtained in the courts.

CHAPTER II

ASSIGNMENT OF CONTRACTS BY THE ACTS OF THE PARTIES

1. **General Rule as to Assignment of Rights and Liabilities under the Contract.** — We have seen that, with few exceptions, the formation of a contract confers rights and liabilities upon those only who are parties to it. But while this is true, one party to a contract may, under certain circumstances, withdraw from it and substitute some one else in his place. A few years ago this could not be done so as to give the person to whom the right under the contract was transferred, who is called the assignee, any right to enforce it. At the present time, however, one may assign his rights, though not his liabilities; so that the assignee may sue in a court of equity, in case the other party to the contract refuses to perform; in many states he may sue in a court of law.

To illustrate what is meant by the assignment of rights and liabilities, suppose A contracts to sell a certain quantity of flour to B for a sum of five hundred dollars. Before B pays, A can direct him to pay the money to X, but he cannot direct him to receive from X the flour contracted for. On the other hand, B may, if he chooses, direct A to deliver the flour to S; but he cannot direct A to look to S for payment of the price.

Before the assignee can be accorded the right to sue, however, it must appear that he has given value for the

rights which were assigned to him; and it must also appear that he has notified the opposite party to the contract that he has acquired his rights. The rule that no liabilities can be assigned is based on common sense. If it were otherwise, you might be obliged to allow a man to work for you with whom you had not contracted and whose services you did not want.

2. Rights which the Assignee Acquires. — When a contract is assigned, the assignee steps into the shoes of the original party, who is called the assignor. He acquires precisely the rights which the assignor had — no more and no less. If you fraudulently induce me to enter into a contract with you, you cannot enforce that contract against me. I have a right to go into a court of equity and have it annulled. If you assign your part of the contract to X, has X any greater rights against me than you had? It is clear that he has not. He has exactly the same rights that you had, and no more. As I was entitled to avoid the contract as against you, I may also avoid it as against X. You had nothing but a fraudulent claim against me; X got an equal claim by the assignment. Any defence that could have been set up by me against you, I now may set up against X. This is the universal rule.

3. Necessity for Notice. — Although the contract may have been assigned in a perfectly regular manner, the assignee acquires no rights under it until the other party to it has been notified of the assignment. This rule is a very sensible one, otherwise one would be in the position of not knowing for whom he must perform his obligations. Suppose you sell me a farm for which I am to pay in installments. You hold a mortgage to secure yourself, until I shall have made the last pay-

ment. Suppose I have paid you part of the money, and then you assign the contract to X. Naturally, I am looking to you as my creditor, and, until I am notified to pay the money to X, I would continue to pay the purchase money to you. X acquires no right to have me pay the purchase money to him until I am notified that I am to do so. Consequently, if I pay another installment to you, or your agent, after the assignment has been made, but while I am still in ignorance of it, I am protected. X cannot collect the money from me the second time, but must look to you for it.

4. Necessity for Consideration. — Not only must the other party to the contract have been notified before he can be charged, but it must also appear that the assignee has given a valuable consideration for the transfer of the contract rights to him. If this were not true, assignments of contracts would be made for the sole purpose of permitting the second party to sue upon them, when there was really no *bona fide* sale of the contract rights. It is to prevent such transactions that the rule as to consideration has been developed.

CHAPTER III

ASSIGNMENT OF CONTRACTS BY OPERATION OF LAW

1. **General Principles.** — Not only may the parties assign contract rights by their own acts, but under certain circumstances the rights, and also the liabilities, may be transferred to some one else without any actual assignment. Suppose A and B make a contract by which it is provided that B is to erect a house for A. While the house is in process of completion A dies; now, what is to be the result? Is B to be released from the necessity of performing the remainder of his contract? Or will he be compelled to complete the erection of the house for some one else who is representing the dead man? The latter is the case. When a man dies all his personal property passes, by operation of law, to certain officers, sometimes appointed by the man himself and sometimes by the court, who represent him and are to settle up his estate. These officers are called executors if they are appointed by the will of the deceased, and administrators if they are appointed by the court, no executor having been appointed. Rights under the contract are personal property. They, therefore, pass to the representatives of the decedent, and they acquire all his rights under those contracts. In the illustration which we have given, the representatives of A could require B to finish his contract, and could hold him strictly to account for any default therein. These per-

sonal representatives are also, within certain limitations, responsible for all claims against the estate, therefore the liabilities of contracts into which the decedent has entered will be imposed upon them.

The same principles apply if a man becomes a bankrupt, that is, if he surrenders all his property to the court to be distributed among his creditors, and receives a discharge from all previous liabilities. In such a case an officer is appointed by the court, in whose hands all the bankrupt's property is placed, and who settles up the estate and pays off the creditors. To this officer, called the trustee in bankruptcy, pass all the rights under any contracts into which the bankrupt may have entered, if these contracts are capable of assignment.

There are also certain other classes where contract rights pass from one person to another without any express assignment of those contracts. This class includes those cases where the owner of land has made a contract about that land with the owner of some contiguous property, and where the agreement thus entered into directly benefits the neighboring land, as where a man agrees with his neighbor not to build any house nearer than twenty feet to the street. This is obviously a benefit to his neighbor, in that it permits him to have better air and light than he otherwise would have. In such cases the rights under that contract may pass to subsequent purchasers of the adjoining land without any express assignment of the contract itself.

A. Cases where Liabilities do not pass by Operation of Law; Contracts for Personal Service. — There are some contracts which, by their nature, are incapable of assignment, such as one which calls for the personal services of one of the parties to it. If you employ a man to

work for you by reason of some personal quality which that man possesses, you cannot be compelled to accept the services of some one else, nor would he be compelled to work for any one except you. If you hire X, who is a celebrated portrait painter, to paint your portrait, and he dies before the completion of the work, it would be manifestly absurd to suggest that his personal representative should finish the picture, and then claim the price. It would be equally impossible for you to assign your contract to B and convey any right to him to compel X to paint his portrait. All contracts calling for a personal relation between the parties are unassignable.

B. Contracts whose Breach involves purely Personal Injuries. — There is another class of contracts in which neither rights nor liabilities will pass by operation of law to the personal representatives or to the trustee in bankruptcy. These contracts are those the breach of which involves only a personal loss to the party injured, and which does not in any way affect the value of his estate. A contract to marry is one whose breach will never give rise to a cause of action on the part of any person except the contracting parties. A was engaged to marry B. B broke the engagement. A afterward died. Her executors sued B to recover for breach of promise. It was held that they could not recover. Such a damage as that is purely personal in its nature. It does not either diminish the estate of the decedent nor increase the estate of the wrongdoer. With the exception of such contracts all contractual rights and liabilities pass by death to the personal representatives.

C. Cases where One of the Parties to the Contract is a Bankrupt. — We have referred briefly to the situation

where one party to a contract has become a bankrupt. We have seen that as soon as he is adjudged a bankrupt, all his property passes at once to an officer of the court, who is called the trustee in bankruptcy. The rights and liabilities, under contracts which the bankrupt may have entered into, pass at the same time to the trustee. The trustee, therefore, may sue on such contracts, and is liable to be sued by other contracting parties who may have claims against the bankrupt's estate. Almost the same limitations are present in the case of a bankrupt that we noticed above in the case where a man has died. A trustee cannot sue upon contracts for purely personal services, nor upon those the breach of which involves purely personal injuries. The trustee also has a peculiar privilege, by reason of the nature of his office, in that he may repudiate unprofitable contracts within a certain time if he chooses to do so.

D. Contracts which pass with the Sale of Land ; Leasehold Interests. — We briefly referred in the opening paragraph of this chapter to a class of cases in which rights under a contract may pass with the title of land which has been sold, when there has been no express assignment of the contract itself. Under some circumstances, simply the act of passing the title to land, or to some interest in land, will carry with it certain contract rights, and sometimes certain contract liabilities. We will first discuss the case in which we are dealing with what is known as leasehold interests in land. If I am the owner of land and lease it to you for a period of twenty years, you are said to own a leasehold interest. You may convey all the "right, title, and interest" which you have in those premises to X,

and X is then entitled to the same possession and privileges to which you were entitled, and is called the assignee of the leasehold interest. If, when I leased to you, you made an agreement in your lease, called a covenant, by which you bound yourself to keep the house on the premises in good condition, would the act of assigning your leasehold interest to X carry with it the obligation to repair? To use more technical language, would the covenant in the lease bind the assignee? In that case it would, irrespective of whether you had contracted only for yourself or also on behalf of your assigns. You may covenant to do a certain act, or you may covenant that you and your assigns will do it. In the case we have stated here it would make no difference whether you named your assigns or not; they would be bound, and X would have to repair. That rule is generally stated thus: Covenants in a lease, which relate to the management or repair of the land or some existing thing upon the land, will bind the assignees of the lessee, whether he names them in his covenant or not.

But suppose you had covenanted that you would, within five years, build a new barn, of a certain size and value, upon a certain part of the land. In that case X (supposing, again, that you had assigned to him) could not be compelled to carry out that agreement unless you in your covenant expressly declared that you intended to bind your assignee. That rule is usually stated as follows: A covenant by a lessee to build something, or to do something concerning a thing not then in existence, will bind his assignees only when he expressly names them in his covenant. If he does they will be bound, otherwise they will not be.

These rules hold good only in cases where a covenant in the lease relates explicitly to the land or to something on the land. If you had made a covenant in the lease by which you had personally bound yourself to do or not to do some particular thing not relating to the land itself, then your covenant could not bind your assignee. If, in the same illustration, you had covenanted that, in consideration of the lease to you, you would never keep sheep upon the premises, the covenant would probably not bind your assignee under any circumstances, because it would be construed to be a personal covenant not concerning the land or its use. Therefore, it is said, if the covenant be of a purely personal nature, it will not bind the assignees even if named.

E. Covenants in Deeds conveying an Absolute Title to Land; at Law. — Having briefly examined the rules relating to covenants in leases, we will now discuss the situation where there has been a covenant in a deed, which conveys an absolute or, as it is called, a “fee simple” interest. Suppose I sell you a piece of land adjoining mine, and upon my land there is a dam so situated that the water which it intercepts flows over your land and forms a mill-pond. You are the owner of a mill, which depends for its water supply upon the pond thus created. When I sell you the land with the mill, I make a covenant in the deed by which I convey the premises to you, that I will keep the dam in repair. If you sell your land to A, could A force me to keep the dam in repair? In other words, would the benefit of the covenant which I made with you pass to A when he purchased the land? In this case it would. The covenant was manifestly made for the benefit of the

man who owned the adjoining premises, including the mill. Therefore, whoever buys the premises is entitled to the benefit of the covenant which I made.

But if I sell my land to X, could you force X to keep the dam in repair? Perhaps I sold to X not mentioning the fact that I was under an obligation to repair the dam. Would it be fair to permit you now to place upon X the burden of performing a covenant of which he may have had no notice? It seems reasonable to conclude that it would not. The benefit of a covenant will pass to all subsequent purchasers of the land for the benefit of which it was made; speaking technically, it will "run with the land," but the "burden" of a covenant, that is, the obligation to perform (in this case, the obligation to repair the dam), will not pass with the land to the subsequent purchasers. This is the rule in courts of law.

F. Rule in Equity; Restrictive Covenants. — The rule as above stated is also the rule in equity when the covenant is one similar to that given in our illustration. A covenant to perform an active duty will not, under any circumstances, bind the purchaser of the land. Under certain conditions, however, covenants not to do certain specified acts will bind the subsequent purchasers. Suppose I am the owner of a large tract of land which I have laid out in city lots. I form a plan by which it is provided that no house shall be built nearer than twenty feet to the street upon which it is situated. There is a stipulation in the deed by which I convey one of these lots to you that you shall not erect a house within twenty feet of the street. You, of course, cannot erect a house within that distance, but could one who purchased from you do so? This

brings us again to the original question, whether the burden of the covenant will run with the land. In this case, you will notice, the covenant is not an agreement to do an act, it is an agreement to refrain from doing an act. If the subsequent purchaser of the land was notified that such an agreement had been made by yourself, he will not be permitted to break the terms of that covenant. A covenant like this is known as a restrictive covenant, and will always be enforced by a court of equity as against subsequent purchasers of the land, if they were notified of its existence. The foregoing are all examples of cases where contract rights are transferred from one party to another without any express assignment.

SECTION III

INTERPRETATION OF CONTRACTS

CHAPTER I

GENERAL RULES FOR INTERPRETATION OF CONTRACTS

1. **Literal Meaning of Words to be Followed.** — We have now seen how the contract may be created and what parties it may affect, and we now ask, How shall we interpret it? We will suppose that the parties have fallen into a dispute over their contract, and are now in court. The question is, What does the contract mean? One party thinks it means one thing : the other thinks it means something else. We will suppose the contract to be either written or oral, but that its terms have been clearly proven, and the one question is, What do those terms mean? The first rule of interpretation is, if the words are clear in meaning, that meaning must be taken literally. If you have plainly said one thing, you will not be allowed to contend that you meant something else. Your words may have a legal significance of which you were ignorant, but that is your misfortune, and you cannot offer it as an excuse for interpreting the contract in some other way. If there is a clear mistake in grammar, or if there has

been an omission of some word in a written contract, which plainly was a mere inadvertence, then perhaps the contract may be corrected or explained. But the error in such a case must be perfectly plain. There must be no doubt as to the real intention of the parties. The point here to be insisted upon is that where the words are clear they must be taken to mean exactly what they say.

2. Intention of Parties to be Deduced from the Whole Agreement. — Keeping in mind the rule that the words, if plain, must be taken to mean only what they clearly indicate, it should yet be understood that the whole agreement will be considered by the court and interpreted as one complete contract; it will not take one sentence or group of sentences and give effect to that part of the agreement, when its meaning is clearly inconsistent with another part of it. If, after considering all its terms, the court is able to deduce from the contract the real intention of the parties, it will do so even though it may, in one sense, do violence to the apparent meaning of some particular clause. If the contract be made subject to a term understood by both parties to be introduced into it, although, perhaps, not expressed upon its face, that will be taken into consideration.

Moreover, if a contract is made in a country where a peculiar custom or usage is known to be in force, it is understood to be made subject to this custom or usage. Where a contract of services was entered into by a drummer or traveling salesman, by which he unconditionally agreed to work for a mercantile house during a specified term of years, he gave three months' notice, and ended his relations with his employers.

When he was sued for damages, he contended that there was a custom which permitted a drummer to terminate his term of service by giving three months' notice, and that this contract was made where that custom was in force, and therefore was subject to its terms. The court sustained this argument. The intention of the parties, as collected from all the circumstances, must have been to make the custom a part of the contract, inasmuch as it was a usage in that locality and had not been expressly excepted. In the same way, if the parties have stipulated that a thing be done within a certain time, as we have already seen, the court will carefully survey the whole agreement to see if the intention of the parties contemplated making the stipulation as to time an essential element of the contract, and will enforce it accordingly.

A. Distinction between Penalty and Liquidated Damages.

— As an example of the rule that the court will examine the entire agreement and endeavor to collect therefrom the intention of the parties, we may here refer to the interpretation of contracts providing for the payment of a fixed sum by either party who has been guilty of a breach. The question involved in such cases is whether the fixed sum was intended by the parties to be a penalty or to be what are known as "liquidated damages."

Suppose you have agreed to build me a house and to complete the work by June 1, 1900, which you fail to do. In the contract is a clause providing that for every day beyond June 1 during which the house remains uncompleted, you are to pay me one hundred dollars. Now, it becomes very important to determine whether we intended this one hundred dollars to be paid by you as a penalty for your failure to complete the work within

the stipulated time, or whether we intended it to represent the amount of damages I would sustain by the delay, and for it to be paid to me as such. If it is construed to be a penalty, then, when I sue you, I can recover nothing but my actual loss, which would be proven by me and determined by a jury. But if the one hundred dollars per day is construed to be liquidated damages, then I may recover the entire amount, regardless of the extent of my actual loss.

We may have expressly stated in the contract that the sum to be recovered is to be considered liquidated damages, but the court will pay no attention to that. It will look at the whole agreement to see what it really is, regardless of what you or I may have said it is. This may seem to be disregarding a term in the contract; but it is not, in reality. The parties, you and I, have made an agreement. The sum named for recovery is either a penalty or liquidated damages; that is a legal question. I cannot make a penalty liquidated damages by saying so, any more than I can make an instrument a sealed contract by simply inserting a clause saying that it is sealed when it is not. The court is the one to determine whether the provision for the payment of the one hundred dollars per day is a stipulation for a penalty or for liquidated damages.

There are one or two rules which are universally followed in arriving at this conclusion. If the amount stipulated to be paid on breach of the contract is to compensate for a loss, uncertain in amount, and which it is impossible to ascertain in advance, then the sum is liquidated damages. In the illustration above, where the one hundred dollars per day was to be paid for delay in finishing the house, that one

hundred dollars per day would be recoverable as liquidated damages. There you see the amount of loss is uncertain. If the amount stipulated for is to compensate for a loss which is certain and definite in amount, and the amount recoverable is greater than the loss, it is a penalty. Suppose I give you a bond by which I obligate myself to pay you one thousand dollars on April 1, 1902, if, prior to that date, I have not paid you a debt of five hundred dollars. There you see the loss is definite and certain — five hundred dollars. The sum recoverable is more than the loss. This is a penalty, and not liquidated damages; accordingly, you can recover only your five hundred dollars and any actual loss you may have sustained. You cannot recover the entire one thousand dollars unless your actual loss has amounted to five hundred dollars. In some cases there may be several terms to the contract. The breach of some would involve a certain loss; the breach of others would involve an uncertain loss. In such a case the party bound is given the benefit of the doubt, and the sum provided for is considered to be a penalty.

CHAPTER II

EXPLANATION AND ALTERATION OF WRITTEN CONTRACTS

1. **Advantages of Written over Oral Contracts.** — It is always safer for one to put his contracts into writing. You and I may agree to-day as to a matter about which we are making a bargain. To-morrow you may remember it one way, and I another. Each of us will probably remember the terms in the way most favorable to himself. In reducing the terms of a contract to writing, be sure that you are clear in your mind as to all the details, and then omit nothing. This point should be emphasized, for if you put down only the principal points, and trust to memory to fill in the rest, the writing will be of little use; because if oral evidence must be brought in to explain some terms of the contract, the court will permit all of them to be thus explained, and the writing is disregarded. But written evidence is the best evidence, and unless it appears that some term of the contract has been omitted from the written instrument, neither party will be allowed to give oral evidence. That is why you should be careful to put everything down. As soon as the court allows oral evidence to be brought in, you might as well throw away your written contract, because you are in reality relying upon your memory, after all.

2. No Oral Evidence will be Admitted by the Court to contradict or vary the Terms of a Written Contract. — Now, we will assume that we have made a written contract, and, a dispute having arisen concerning it, we come into court about it. You wish to prove the contract. The first thing you have to do is to prove that this writing is the contract between you and me. If our contract is sealed, you prove that I sealed and delivered it to you. If it is not sealed, but “parole,” you prove that I am the party who signed. The most common way to prove that would be to prove the signature to be mine. Having established the fact that the paper here in court contains the written evidence of the contract between you and me, the court will say: “Let us see the writing, to determine what the contract in fact is.” Then if I want to go on the stand and testify as to what we agreed upon, the court would say: “No, you have deliberately reduced the terms of your contract to writing. Now you must abide by what you have written.” In other words, it is a general rule that no oral evidence will be allowed to vary or contradict the terms of a written contract.

A. Oral Evidence to affect the Validity of a Written Contract. — Although I may not go upon the stand to testify as to the terms of a written contract which is before the court, I may testify concerning the contract if my purpose is not in any way to vary or contradict its terms, but is to question its validity. Suppose I want to testify that the contract was signed under the fear of violence, or under a mistake as to its nature, or that I was deceived by fraudulent misrepresentations — in all these cases I am offering evidence not as to the terms of the contract, but as to its validity. That

may be done, otherwise one would be powerless to attack the validity of a written contract into which he had entered against his will, or under a mistaken impression as to the instrument he was signing.

B. When Part of the Contract is Omitted. — If, as before pointed out, the parties, in writing their contract, forget to insert some important provision of it, oral evidence may be brought in to show what the omitted term was. The practical effect of such an omission is to destroy the advantages to be gained by writing the contract. Once open the door to oral evidence and the written agreement is of little practical benefit. In order to bring in oral evidence as to a missing term, the party who wishes to do so must first conclusively prove to the satisfaction of the court that some term has been omitted from the writing. Until he does that, he is not at liberty to testify at all.

C. Oral Evidence to explain Written Terms. — Although you can never contradict the terms of a written instrument by oral evidence, you may, nevertheless, explain these terms if they are not clear. A contract may contain technical language which must be explained before the jury can understand what is meant. Sometimes the words will admit of two meanings, and then oral evidence may be brought in to show which one the parties really intended. Again, the words may be of such a nature that it is almost impossible to tell what they mean without some further explanation.

A and B made an agreement in writing, by which A promised to sell wool to B. The only words in the contract which in any way described the wool was a clause in B's agreement wherein he described it as "your wool," meaning A's. The court allowed oral

evidence to be brought in to show what B meant by "your wool." In the same way technical terms may be explained. A vessel being insured is impliedly warranted to be sea-worthy; oral evidence may be brought in to show what is meant by sea-worthy, or, as was done in one case, to show that in the particular contract under discussion the parties had a different meaning from the one usually attached to the word. Ambiguity may always be explained away; but if the language be absolutely unmeaning, oral evidence will not be allowed to create a meaning where there was none before, for this would be adding to a written contract by oral evidence.

D. Oral Evidence to show the Existence of a Custom affecting the Contract. — We have referred to the fact that if a written contract, embodying an agreement between two parties, be made in a place subject to a particular custom or usage, that custom or usage becomes a term of the contract. If the custom or usage be not mentioned in the agreement, and one of the parties wishes to prove it by oral evidence, it may perhaps be objected that to allow him to do so would be to add to a written contract by oral evidence. This, however, is not correct. As a matter of law, the custom or usage is already a part of the contract. To permit oral evidence to explain what a custom is, is merely to prove an omitted term. A case where a custom or usage becomes a part of the contract would be where a tenant rents a farm for a year, dating his lease January 1. Oral evidence would be admissible in such a case, to prove that there was a custom which permitted the tenant to return to the farm after his lease has expired, and reap the wheat which he had sown the preceding autumn.

E. Admission of Oral Evidence in Equity. — When you come into a court of equity and ask it to force the opposite party specifically to perform his contract, much more freedom in the admission of oral evidence is allowed. Courts of equity offer many remedies which a court of law cannot, and in applying these remedies they exercise a large amount of discretion. If you come into equity and ask the judges to force me to carry out my contract with you, they will carefully go over the ground to see if you have been guilty of any wrongdoing or if there is any conscientious reason why I should not be compelled to carry out my agreement. The court may, in its discretion, either grant the remedy or not, as it thinks best, and is not bound by rigid legal rules. Therefore, to see if, on the whole, the remedy should be granted, the court of equity will often allow oral evidence when a court of law would not. A made a written contract to buy B's house and park. B was seeking specific performance. A was allowed to show, orally, that he had misjudged the boundaries of the park, and thought it contained some valuable trees, which it did not. The court refused to carry out the contract.

3. Alteration of Written Contracts. — Having briefly discussed the interpretation of written contracts, there remains to be said a word about the alteration of contracts which have been made in writing. If both parties are willing, the terms of a written contract may be altered at any time. This may be done by oral agreement or by actually changing the writing, remembering, however, that in cases where the original contract must be written, by virtue of the statute of frauds, the alteration must be written also. If the original instrument to be valid must be under seal, then the

alteration must be under seal also. These rules apply because the effect of altering a contract is practically the same thing as making a new one. It follows that in all cases, if the alteration be not under seal, there must be a consideration for it, or it is void, being a gratuitous promise. This consideration is usually a change in the contract price of the work done, etc. When there is a clause in the original contract providing for alterations without a new consideration, the alterations are really founded on the old consideration, and nothing more is necessary. It is always better to insert some kind of provision as to alterations in the original contract. This will prevent disputes when the need for alteration arises, as it does arise in nine cases out of ten where the contract is a building contract. The alterations referred to here are those made after the original contract has been executed. If at the time the parties are negotiating, they find it necessary to erase or alter the terms of the paper which they are about to sign, it is customary to place a note on the margin, which calls attention to the fact that the alteration was made before the paper was signed.

SECTION IV

DISCHARGE OF CONTRACTS

CHAPTER I

DISCHARGE BY AGREEMENT

1. Mutual Release. — Having discussed the manner in which a contract may be created, whom it affects, and how it may be interpreted, we now come to the question, How may this relation be discharged? How may the tie which binds the parties be unloosed? If two parties have entered into a contract by which they mutually bind themselves to do certain acts, it follows as a matter of common sense that, if they both agree, they may release each other from their respective obligations. As individuals may freely enter into contract relations with other individuals, it is obvious that by consent of all parties, they may just as freely retire from such obligations.

If neither party has performed his part of the contract, that is, if it is an “executory” contract, nothing is necessary to discharge it except the mutual consent of those bound under it. In such a case the surrender of the rights of one is the consideration for the surrender of the rights of the other. If, however,

one party has performed his part of the agreement, he has acquired an absolute right to have the opposite party perform his part. If he waives that right and agrees to release the other party, this agreement must be under seal or must be supported by a consideration, otherwise it will not be binding. The parties, if they choose, instead of merely releasing one another from their obligations, may substitute a new agreement for the old, or may so alter the terms of the old agreement that a new one is practically made. In such cases the old contract is absolutely discharged.

If two parties are endeavoring to discharge a contract by mutual consent or by the substitution of a new agreement, they should do it in the same manner in which the original contract was made. If the original contract is in writing, the discharge also should be in writing; if it is under seal, the discharge should be under seal. This arises from the general rule that an instrument may not be discharged or altered by another instrument less solemn than itself.

Sometimes the contract itself contains provisions by which it is to be discharged upon the happening of certain conditions. Suppose a common carrier, *i.e.* one who carries goods for hire, agrees to carry your goods safely from Liverpool to New York, "dangers of fire and sea excepted." If the vessel is wrecked at sea, or burns, the contract is at an end. Again, suppose a contract of service contains a stipulation that either party may terminate it by a month's notice. An exercise of the option would, obviously, put an end to the contractual relation.

CHAPTER II

DISCHARGE BY PERFORMANCE

1. Payment and Tender. — The second way in which the contractual tie may be loosened and the parties returned to their original position, is by performance. If you and I have entered into a contract by which we have mutually agreed to perform certain acts, and we have both completely performed those acts, then the contract comes to an end, because there is no longer any reason for it to exist, its purpose having been accomplished. If you were under an obligation to pay me one hundred dollars and have paid the money, it is perfectly clear that I no longer have any rights against you under the contract. If I sue you, you may plead “payment,” and of course I cannot recover. If you offer to pay and I refuse to accept, you have made what is known as a “tender.” If the defendant proves “tender,” he does not thereby excuse himself from paying the amount of the debt, but he does excuse himself from the payment of any costs of the suit, or interest, or damages for delay.

2. Promissory Notes in Conditional Payment. — If one party to the contract discharges his obligation, not by the payment of money, but by giving a promissory note for the amount, the payment is said to be conditional. The promissory note, as you will learn when you take up the part of this book relating to negotiable paper, is

of value in itself, and, therefore, the contract is discharged by giving a promissory note instead of money. But its discharge is conditional upon the promissory note being paid at maturity. If it is not paid when it becomes due, then the original contract revives and again becomes in full force, so that one party may sue the other upon it if he chooses to do so, instead of trying to collect the note.

CHAPTER III

DISCHARGE BY BREACH

1. **The Broken Term must be an Essential Element of the Contract.** — We have endeavored to make it clear that a contract is a relation which exists between two or more individuals. That relation may be thought of as involving a tension between them. They may be considered as being bound together by contractual cords. If these cords are untied by mutual consent of the parties, the contract is at an end, because the tension is destroyed. We have seen, also, that if they have served their purpose, then the tension is relieved, because it has done what it was intended to do. In the same way, if one party has broken some essential part of the contract, that will destroy the tension and, therefore, destroy the contractual relations just as completely as any of the other methods. If one party, therefore, has failed to perform his part, or has done some act which clearly amounts to a breach of the contract, the relation being absolutely destroyed, no more rights can then be claimed or upheld under it.

The injured party has, it is true, a right against the other, but it is not a contractual right; it is a claim for damages. In such a case the question always arises whether the default of the defendant, admitting there has been one, is of such a nature as completely to dis-

charge the contract; also, whether he has broken an integral term of it or only a collateral agreement or warranty. We have already discussed the distinction between a representation or agreement which is an integral part of the contract, and one which is only collateral to it. In the one case, the failure to make good the representation, or to perform the agreement, will discharge the contract so as to free the other party from all duties on his part. In the other case, while this failure may give rise to an action for damages, it will not discharge the contract itself.

2. Breaches of Divisible Contracts. — We must not only examine carefully the default of the party to see whether he has broken an integral term of the contract, but we must also examine the contract itself to see whether the breach affects the whole of it. Is it a breach which will destroy the entire contract or only a part of it? Sometimes a contract is entered into in such a manner that it really consists of a number of separate agreements. The question then arises whether a breach of one of these agreements will destroy the entire contract, or whether it will destroy only that part which it affects. A agreed to sell B eight thousand tons of iron, to be delivered in twelve monthly installments; B was to send wagons to receive it. He failed to send enough wagons the first month. The question was, whether the contract was really a series of twelve contracts, one for each month, so that a breach of one would have no effect on the others, or whether it was to be considered as one single contract, so that the failure to provide wagons would operate as a discharge of the whole contract. In this case it was held that the failure by the plaintiff to perform his part in one month

did not affect the other parts of the contract — he could enforce the delivery in the other months. This is what is known as a divisible contract. This decision is a very close one. There are cases nearly similar which have been decided contrary to it. If the court is of the opinion that the parties really intended a series of agreements to constitute only one contract, then a breach of one of the parts will destroy the whole; otherwise the decision will be as in the illustration which we have discussed.

3. Breach by Renunciation. — We now assume that the contract is entire or single, and that the condition violated is an essential part of the agreement. One of the ways in which a breach of such a condition may be brought about is by a renunciation of the contract. If one party distinctly declares his determination to go no further with it, this frees the opposite party from all obligation to perform his part under it, and gives him at once a right of action for damages against the party so renouncing. He has this right of action, whether the renunciation was made before or after the time when the contract was to have been performed.

It was thought at one time that a breach occurring before the time when the contract was to be performed would give the opposite party no right of action. It was thought the breach could not be complete until the time had come when the other party was expecting the promise to be fulfilled, and he had been disappointed. This is no longer the view of the courts. If one party distinctly declares that he will not perform the contract, this operates as a complete breach. A, who was a lecturer, hired B to go with him on a tour to act as

courier. The term of service was to begin on June 1. On May 11, A wrote to B, saying he had decided not to take him with him. B at once began an action for breach of contract, and it was held that he was entitled to recover, even though the time for the performance of the contract had not yet arrived. The breach was complete upon A's repudiation of the agreement. The reason for this decision has been already explained. The contract is in itself a thing of value, a relation, existing between the two parties. If either breaks this relation, even though it be before the time when the contract is to be performed, he has forever severed the cords which bind the two individuals, and has been guilty of a complete breach. It is obvious that if, after the time for the performance has arrived or during the course of the performance of the contract, one party refuses to continue, such a breach will absolutely destroy the contractual relations.

4. Where one Party makes the Performance Impossible.

— Not only may one party to a contract be guilty of a breach by formally refusing to carry out his part of it, but if he deliberately places it out of his power to perform, he has been guilty of just as complete a severance of the contractual relation. As in the other cases, this will operate as a complete breach whether it is done before or after the time for the performance of the contract. A promised to assign all his interest in a lease to B before the expiration of seven years. After one year A assigned to another party. This gave B a right to sue at once. He did not have to wait until the expiration of the seven years.

An interesting case arose during the late war between China and Japan. An Englishman had been hired by

the Japanese government to act as fireman on a Japanese warship on a trip from the Tyne to Yokohama. During the voyage war against China was declared by Japan. If he had continued in the service, the Englishman would have been liable to punishment by his home government, under the penalty imposed by the foreign enlistments act. He contended that the Japanese government, by declaring war, had made his performance of the contract impossible, and that he, therefore, had a right of action for the breach. The court sustained him in this contention.

5. Failure of Performance. — We have explained how a refusal to perform, or putting it out of one's power to perform, operates as a complete breach of a contract. It is just as complete a breach if one party without refusing merely fails to do his part. This really needs no explanation further than the observation that the failure to perform must be a failure to perform an essential part of the contract, and must be applicable to it as a whole. The other party is not entitled to treat the failure to perform as a breach until after the time for the performance has entirely passed.

CHAPTER IV

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

1. **Impossibility Apparent on the Face of the Contract.**

—It sometimes happens that parties who have entered into agreements will be released therefrom, owing to some reason not connected with the contract itself, but which the court nevertheless will take into consideration. Earlier in the discussion we had an illustration in which A agreed to give B a sum of money, in consideration of which B agreed to drink up all the water in the sea. There was, as we saw, no contract created in the case, because the consideration which was given was not a real consideration, it being manifestly impossible to perform it. Technically speaking, this is not a case of discharge of contract at all, because no contract ever came into existence, but it is proper to refer to it here because of its similarity to the subject under discussion.

2. **Impossibility on Account of Mistake.** — We have also discussed in another part of the subject of contracts the situation in which it was impossible to perform the contract by virtue of some mistake into which the parties had fallen. In the illustration where A and B contracted for the sale of a cargo of corn, then supposed to be on board a certain ship, which was in fact at the bottom of the ocean, we saw that there was no contract. It might be said there was no contract because it was impossible to be performed; but the real reason is that the original agreement being based on mistake, no

contract was ever created. This case of impossibility of performance is also referred to at this point, not because it is a technical case of discharge of contract, but because it is very closely allied to what follows.

· **3. Impossibility arising after Contract is made.** — In the two cases above mentioned, where the impossibility existed at the time the agreement was formed, we saw that no contract was created. We now reach a situation where there was no impossibility existing at the time when the parties made their agreement, but where some facts that have arisen since have caused the performance of the contract to become impossible. As a general rule, common law courts will not excuse a man from his obligation to perform a contract on the plea that it has become difficult or impossible for him to do so. They cannot, of course, make him perform it if it is impossible to do so; but he is answerable in damages for any loss accruing to the opposite party by virtue of his failure to perform, notwithstanding the fact of the impossibility. This occurs only in cases where the promisor has made his promise without conditions. If he does not wish to become responsible for loss in such cases, he should introduce some such stipulation when he makes his contract.

A agreed to carry a shipload of corn from New York to Philadelphia, and to unload it at a wharf in the Delaware River before the 19th of June, 1900. If the weather had been propitious, A would have had plenty of time to perform his contract. As it was, a great storm absolutely prevented him from getting up the river until ten days later. B sued him for the failure to perform within the time specified, and A replied that it was absolutely impossible for him to have done so

on account of circumstances which were entirely beyond his control. But this was no excuse. If A did not wish to be held responsible in such a case, he should have said in his contract that he would unload at the day specified, "storms excepted."

A. Cases where Subsequent Impossibility will Excuse. — Although the general rule is as we have stated it, there are some situations in which the law will excuse the performance of a contract if it has become impossible by events arising subsequent to its formation.

If, after the contract is made, there has been a change in the law of the country wherein it was to have been performed, which absolutely prevents it from being carried out, the parties will be excused from performance. A sold land to B, B making a contract by which he agreed that upon a certain piece of the land which he had bought from A, neither he nor his assigns would allow any buildings except ornamental ones to be erected. An act of Parliament provided for the erection of a railroad station upon that very spot. A attempted to charge B for the damages accruing to him by virtue of the erection of the station, claiming that B had unconditionally bound himself and his assigns that no such buildings should be placed at that point. The court decided that B was excused. The act of Parliament authorizing the erection of the building made the fulfillment of his agreement impossible.

If a contract has been made, calling for the performance of some personal service on the part of one of the parties to it, and that person dies, the contract is then at an end, as it is impossible, of course, for it to be performed. The estate of the decedent does not have to answer in damages for the failure to perform.

CHAPTER V

DISCHARGE BY OPERATION OF LAW

A. Merger. — Under certain circumstances, a contract may be discharged by operation of law without any specific agreement by the parties, and also without any breach or intervention of circumstances making the performance impossible. We have referred briefly to the case where a sealed contract is made about the same subject-matter already included in a simple contract. We saw that the simple contract disappeared, and that we had left only the sealed contract. This is what is known as “merger.” Whenever two instruments, one of which is of a higher or more solemn order than the other, refer to the same subject-matter, the lesser merges into the greater, and is thereby discharged.

B. Alterations of a Contract. — It will be remembered that two parties to a contract may alter it by mutual consent. It goes without saying that one cannot alter it without the consent of the other. If I make a promissory note in your favor for the amount of one hundred dollars, and you so alter it that it reads one thousand dollars, not only is there no contract by which I am obliged to pay you one thousand dollars, but the agreement which I originally made to pay you one hundred dollars is discharged. You, by your alteration of the contract, have relieved me from any further responsibility. This is always the case if alterations

be made by one party without the consent of the other, provided the alteration is a change in a material term of the contract, and is made intentionally. If it be made unintentionally, the original contract stands as it was in the first place; or if the alteration be made by a stranger, that does not affect the original contract at all. In order to work a discharge, the alteration must be made by a party to the contract with the intention of varying the rights of the parties.

C. Bankruptcy. — There are certain acts of Congress in force in this country providing that in case a man becomes unable to pay his debts, he may surrender all his property to the court in order that it may be distributed among his creditors, and he is thereafter discharged from any further liabilities for any of his former debts. This discharge in bankruptcy operates not only to discharge debts which he may owe, but also discharges all contracts on account of which he may be under some obligation. If, however, a man who has been thus discharged makes a new promise to fulfill his contract or to pay his debts, this promise will revive the old obligation, and he may be compelled to perform without any new consideration.

SECTION V

REMEDIES FOR BREACH OF CONTRACTS

CHAPTER I

REMEDIES IN COURTS OF LAW

1. **Measure of Damages.** — It has been shown how one party to a contract may be guilty of a breach, which operates to discharge the opposite party from any liability to perform his part. The contractual relation has been absolutely severed, and neither party has any more rights under the contract itself. But, as you can well believe, it would be most unjust if the injured party did not have some remedy open to him. Although he has lost his rights under the contract, he has gained in place of them a right to sue for damages. If he does so, he may recover an amount sufficient to put him in the same position, so far as money can do it, as that which he enjoyed before the breach occurred. When two parties enter into a contract, they undertake mutually to perform it, or to pay any damages that could reasonably be expected to follow from a breach of it. Consequently, where one is suing for damages, he can recover only those damages which could reasonably be expected to result from a breach of the particular

contract that was broken. Suppose a railroad company agrees to carry you from New York to Chicago in twenty-four hours. The company fails to perform its contract in that the train is three hours late. As a result of the lateness of the train, you miss an opportunity to meet a business engagement which would have been worth ten thousand dollars to you. You could not recover ten thousand dollars; that amount would not be an ordinary result of the lateness of the train.

It must also be remembered that damages for breach of contract are for compensation, and not for punishment. The plaintiff can recover only his actual pecuniary loss, not for injury to his feelings or to punish the defendant. To this rule there is one exception. In the action for breach of promise of marriage, the plaintiff may recover for injury to his or her feelings as well as for the pecuniary loss, if any. If an agreement has been made as to the amount of damages to be paid in the event of a breach, that amount is recoverable as liquidated damages. The distinction between liquidated damages and penalties has already been explained.

CHAPTER II

REMEDIES IN COURTS OF EQUITY

1. General Principles of Equitable Jurisdiction. — Sometimes, from the peculiar nature of the contract which has been made, money alone cannot compensate the injured party for the breach. From the explanation which has been given of the duties of courts of equity, you will understand that this is one of the particular places where their jurisdiction is invoked. If damages will not compensate, that is, if at law there is no adequate remedy, then the one who has been injured may apply to a court of equity, asking it to force the opposite party to carry out his part of the contract. This remedy is what is known as specific performance. The court of equity will grant it, if it clearly appears that there is no adequate remedy at law, and if no valid reason is urged why the contract should not be carried out in conformity with the original agreement of the parties.

A. When there is no Adequate Remedy at Law. — It is sometimes a difficult question to decide when there is not an adequate remedy at law. One of the most common illustrations of such a contract is one for the purchase of land. Suppose you have contracted to purchase a particular lot of ground, intending to erect a residence upon it. You have perhaps made extensive plans relating to its erection, and for your arrangements after you

have permanently located there. You no doubt chose the site of ground largely by virtue of its location, perhaps because it was situated in close proximity to friends, or because of the fine view that could be obtained from the premises. Damages could not compensate you for the loss of these things. You could not go into the market and buy another lot of ground which would suit you as well. If you could, damages would compensate you, because the other party would be compelled to pay you the difference between the price which you had to pay for the land which you did buy, and the price you were intending to pay under the contract. Courts of equity will nearly always specifically enforce contracts for the purchase of land.

If your agreement is for the purchase of goods, you can, as a rule, be fully compensated by damages, for, failing to get them under your agreement, you can, ordinarily, go into the market and purchase them elsewhere. If you were compelled, in such a case, to pay more for them than you had contracted to pay, you could recover the difference from the party who had broken his contract with you. Sometimes, however, the specific goods may possess to you a peculiar value, which cannot be measured in money. If so, you may have specific performance, as, for instance, if you had agreed to purchase an heirloom that to you is of a value far above its intrinsic worth.

B. Remedy Discretionary. — It should be remembered in this connection that the remedies granted by a court of equity are discretionary. It may grant an injunction to compel the opposite party to perform the contract if it sees fit, but if it does not see fit, then you are not entitled to demand it as you would be entitled

to demand a remedy in a court of law, because the courts of equity are not absolutely bound by rigid rules, as courts of law are. If the party who is seeking specific performance has been guilty of improper conduct, he will not be permitted to succeed. If the contract which he entered into with the opposite party is an unjust contract, the court will not enforce it. If he has been careless about prosecuting his remedy, and has waited a much longer time than was necessary, again will he be refused the relief which he asks.

C. Contracts involving Duties of Supervision. — Following out the idea expressed in the preceding paragraph, the court will refuse specific performance, if granting it would involve the court in duties which it does not care to undertake. Suppose B has agreed to build a railroad for A, the performance of which agreement would necessarily involve the labor of months, and perhaps of years. If the court should command B to build the road, its command would be useless unless it would see to it that B performs his work faithfully. To do that would require duties of supervision and oversight lasting over this long period of time. This the court will not undertake. If specific performance involves such duties as this it will, therefore, be refused. A contract to build will rarely be enforced.

D. Contracts for Personal Service. — If the contract is one which calls for a personal service from one party to another, the court will never specifically enforce it, because to force individuals to maintain a close personal relationship toward each other when they do not wish to do so, would be worse than to allow the contract to go unperformed. Moreover, it is often impossible to

enforce such contracts. If A agrees to sing for B, the court might compel A to go upon the platform and might perhaps compel her to sing, but it certainly could not compel her to give her best energies to the work. If in such a case, however, the party has agreed both to do some act and to refrain from doing some other act, the court will sometimes enforce the second part of the contract when it cannot enforce the first. Mademoiselle Wagner had agreed to sing for a theatrical manager, named Lumley, for an entire season; she had also agreed to sing for no one else during that period. She refused to perform her contract. Lumley asked a court of equity to enforce her to do so. The court said it could not make her sing, but it could prevent her from singing for some one else, which it did. The practical effect of this decision was to force Mademoiselle Wagner to sing for Lumley, because otherwise she would have been compelled to remain in idleness.

CHAPTER III

HOW RIGHTS OF ACTION, ARISING FROM BREACH OF CONTRACT, MAY BE DISCHARGED

A. By Act of the Parties. — When the contract is broken, all legal rights under it disappear; in place of them the injured party has a right of action for the breach. The next question is, How may this right of action for the breach be discharged? The first way in which it may be discharged is by the voluntary act of the parties. The injured man may release the opposite party to the contract from all claims which he may have by virtue of the breach. Such release must either be under seal or else it must be supported by a consideration; otherwise it is not binding. The usual consideration in such a case would be the payment of a sum in satisfaction of the damages.

B. By Suit and Judgment. — If the parties are unable to reach an amicable agreement with regard to the satisfaction of the claim for damages arising out of the breach, the injured party may be compelled to resort to a court of law. If he does so, and recovers judgment upon his claim, the right of action, which he originally had, thereupon disappears. He now has a claim against the opposite party, which is founded entirely upon the judgment which he has recovered. Just as a simple contract will merge into a sealed contract when both relate to the same subject-matter, so a right of action,

arising out of a breach of contract, will disappear and merge into a debt of record when the latter is created by the recording of the judgment.

C. By Lapse of Time. — In England, and in all states of this country, statutes have been passed which provide that where a right of action accrues for breach of contract, the party to whom such right accrues, must prosecute his suit within a limited time, specified in the act, or he cannot do it thereafter. The period named varies in different states. In most states the right of action, arising from the breach of a simple contract, must be prosecuted within six years from the time the breach occurs. A right of action, arising from the breach of a sealed contract, must usually be sued upon within twenty years. In both cases there are exceptions made, if, at the time the contract was broken and the right of action arose, the person to whom it thereby accrued was under some kind of disability, that is, if he was an infant, or insane, or imprisoned, or "beyond seas," or, if a woman, was married.

If some one of these disabilities existed at the time the right of action first arose, then the period of time named in the act does not begin to run until the time when the disability is removed. If the individual was an infant, the statutory period is counted from the day he becomes twenty-one years old; if a married woman, it is counted from the day her husband dies; if "beyond seas," from the time the individual returns, and so on. If, at the time the cause of action first arose, no one of these disabilities existed, the fact that one was afterward imposed upon the person who has the right of action, will not prevent the lapse of time from barring the right. Suppose a woman twenty-

two years of age comes into possession of a right of action for breach of a simple contract, and marries a year afterward. Her right of action will be barred six years after the time her right first accrued. The fact that she afterward married will not help her. Just as in the case of bankruptcy, a subsequent promise to pay or to perform, will bind, so a subsequent promise to discharge an obligation, arising from a contract which has been barred by the lapse of the statutory period, will revive the old obligation, and no new consideration is necessary.

PART III

SALES

CHAPTER I

ESSENTIAL CHARACTERISTICS

1. **Sale distinguished from Bailment or Exchange.** — The sale is one species of contract. In entering upon the discussion of its nature, we do not therefore meet with many principles essentially new. All the elements of contract which we discussed in the preceding part of this book, are also necessary elements of every sale.

The distinguishing features that separate sales from other contracts are, first, the circumstance that the sale is a contract for the transfer of the ownership of, or title to, property; and, second, that the transfer must be for a price in money. If the property in one thing is transferred in consideration of the transfer of another thing of supposedly equal value, the transaction is not a sale, but a barter or exchange. If the property be delivered to another temporarily, with a *proviso* that the original property is to be returned, this constitutes what is known as a bailment. The title to the thing does not pass out of the original owner. A barter or exchange is for all practical purposes a sale,

as the ownership or title to the property passes from the seller, called the vendor, to the buyer, who is known as the vendee. But a bailment is essentially different, for here the title does not pass at all.

2. Difficulty of determining between Sale and Bailment.

—It is often difficult to tell whether a transaction is a sale or a bailment. Suppose A sends wheat to B, a miller, in return for which B is to give to A a certain amount of flour in payment. Before the wheat is ground the mill burns, and the grain is destroyed. If the wheat is owned by A, he suffers the loss. If it is owned by B, he will be the loser, for having acquired the title, he will be obliged to deliver the stipulated amount of flour to A. In the case in hand, the solution of the problem would depend upon the exact terms of the contract. If the agreement had been that the miller was to return the flour made from the identical wheat deposited with him, then the title to the wheat remained in the original owner, and the contract was one of bailment. If, on the other hand, the same wheat was not to be returned in the form of flour, but was to be mixed with other wheat, and the owner was to be paid with flour made from other wheat, then the contract would be a sale or exchange, and the title having passed to the miller, he would suffer the loss.

This illustration embodies the general rule for distinguishing between sale and bailment. If the contract calls for the return of the identical thing, though it may be in a different form, it is one of bailment. Where the identical thing is not to be returned, but is to be paid for by money or by some other thing of value, the contract operates to pass the title, and is a sale or exchange.

3. Exception to the Rule. — There is one exception to this rule which, as it is a very common one, should be referred to at this point. If you deposit wheat with the owner of a warehouse, under a contract by which you are to receive on demand, not your identical wheat, but wheat of an equal grade, your contract is a bailment and not a sale. It would be impracticable to keep everybody's wheat separate from the rest, when so many thousands of bushels are stored in one building; consequently, all of it which is of a similar grade is mixed up and stored together.

If this has been done and the warehouse burns, all the depositors will lose their wheat if it is still their property, for, assuming the fire to be accidental, they will have no claim against the owner of the warehouse. But if the title to the wheat has passed to the warehouseman, then the loss falls on him alone. He is still bound to pay the farmers for their wheat. It can readily be seen that the latter result would be unjust. The intention of the depositors was to make a bailment, and not a sale. The courts, taking this into consideration, have decided that, although such a contract does not provide for the return of the specific thing, it is, nevertheless, a bailment. They reconcile this with the rule above given by saying, that while the specific wheat is not to be returned, yet the return of wheat of equal grade is practically the same thing as the return of the identical wheat put in, — in short, that a contract for the return of an equal number of bushels of grain of the same quality is, for all practical purposes, a contract for the return of the same grain.

CHAPTER II

WHO MAY SELL

1. Parties must be Capable and Vendor must be Owner.

—The parties to a contract of sale must, in the first place, be capable of contracting. This is obvious from the statement above, that all the essential elements of a contract must be present. In the second place, the vendor, as a general rule, must be the owner of the property which he intends to sell, *i.e.* he must either be the owner or his agent. One of the fundamental principles of the common law is that the title to property must be protected. If your property is stolen and sold to A, the latter gets no title, because the thief, having none, could give none to the purchaser.

When we say that the seller must be the owner, however, we do not necessarily mean the absolute owner. He may have a title which he has obtained by fraud; but if he has title at all, he may convey a perfect title to an innocent purchaser. This is particularly true of the sale of negotiable instruments, such as promissory notes and bills of exchange. It is also true, though in a more restricted way, of sales of personal property. The possession of personal property is *prima facie* evidence of ownership; and though a vendor may have acquired his possession and title to the chattel by fraud, and although the real owner could set the sale aside as against the fraudulent vendee, he cannot do so as against an innocent vendee.

A. Voidable Title and no Title. — It is sometimes difficult to determine between cases where the fraudulent vendee has actually acquired title, even though it be a voidable one, and cases where he has acquired no title at all. If the latter be the case, he can convey nothing to a subsequent purchaser from him. If the original vendor parts with the property with the intention of selling to the party who is negotiating with him, then, no matter how he may have been deceived, he has parted, at least temporarily, with the title, and the fraudulent purchaser may convey to a third person a better title than he himself has. But it sometimes happens that a would-be vendee will pretend to be the agent of some one else.

A went to B, a farmer, and offered to buy his wool, representing himself to be the agent of, and purchasing for, X and Company, a well-known firm with which B was familiar. As a matter of fact, A had no connection whatever with the firm; but B, believing his representations, sold his wool, as he thought, to X and Company, and shipped to them. A presented himself to the freight agent at the other end of the line, again represented himself to be an agent of X and Company, and obtained possession of the wool. X and Company, who knew nothing of the previous transactions, bought of A, who pocketed the money and left for parts unknown.

B, finding himself swindled, sued X and Company to regain possession of the wool, contending that he was still the owner; that as A got no title, he could give none to X and Company, and that the wool should be returned. On the other hand, it was argued that A got a voidable title, and X and Company, being

innocent purchasers, should be protected. The court decided that B could recover. He never intended to sell to A. He intended to sell to X and Company. X and Company never intended to buy of him, hence there was no contract at all, and therefore no passing of the title. As it still remained in B, he was entitled to get his wool back again.

If, in the illustration, A had represented himself to be C, and B had sold to A, thinking him to be C, the court would have refused a recovery, on the ground that if the vendor intends to sell to the man before him, even though he is mistaken as to his identity, the title will pass. This is explained by saying that when you see the individual with whom you are dealing, you sell to the personality before you, and the fact that you are in error as to his name is not material; whereas, when you do not intend to sell to him at all, but to some firm whom he falsely says he represents, you do not sell to anybody. You do not intend to sell to the party before you, and the firm whom he says he represents, does not intend to buy, consequently there is no contract, and not even a voidable title can pass. When you bargain with the man before you, his personality outweighs your supposed knowledge as to his identity. Of course, in such a case, the contract may be set aside by you if it is unperformed; but if the purchaser has sold to an innocent third party, you cannot take the property so acquired away from him.

2. Cases where Vendor who has no Title at All may Convey. — There is a class of cases which is an exception to the rule that one who has no title at all can convey none. When the true owner has permitted some

one else to exercise acts of ownership over his property, to such an extent as to deceive other people into believing that the apparent owner is the true owner, then if the property be sold to innocent third parties, who rely upon the apparent ownership, the true owner cannot complain. The innocent purchaser therefore really gets a good title.

In such cases it is not enough that the owner shall have surrounded the vendor with the appearances of ownership, — the purchaser must actually have been deceived by them. Furthermore, although the vendor may have been given some of the appearances of ownership, and even though the purchaser has been deceived, yet he will not gain a complete title unless the appearances were plain enough to deceive any ordinary man.

The mere fact that the property was in the possession of the vendor is not enough, nor that he has retained it for a long time, with the consent of the owner. Thus, where a father loaned a horse to his son, allowing him to use it as his own, and even speaking of it as his son's horse, the court decided that this alone would not be sufficient to deceive ordinary people into believing that it was actually the property of the son, and an innocent purchaser from him got no title.

The most common instances of cases where the purchaser gets a good title are cases where the vendor has retained in his own possession a chattel formerly belonging to him. There his retention would operate to deceive third parties, and they are protected. This particular phase of the question will be discussed more at length in a later paragraph. As another instance of the conveyance of a good title by one who has none, there is a rule of law in England that if goods are sold

in the open market, in places where such goods are usually exposed for sale, the purchaser acquires a good title, even though the articles might have been stolen from some third party. This is called the doctrine of market overt, but has never been in force in the United States.

3. Cases where True Owner invests Fraudulent Vendor with Apparent Authority to Sell. — Although the owner of property may not have given another the apparent ownership of it, he may have given him the apparent authority to sell it. When the vendor sells, the purchaser thinks he is buying from the agent of the true owner. When we get to the subject of Agency, you will learn that one may make a valid contract or a sale, by means of an agent, just as well as he may do it himself. You will also learn that if the agent makes a sale which the principal has not authorized him to make, no title will pass. The same theory applies as in the case of a sale by one who has no title, *i.e.* no man can be deprived of his property without his own consent; consequently, as a general rule, the sale by the agent passes nothing unless he was authorized to make it. But where the principal has apparently given him authority to sell, the same rule should and does apply, as in cases where the owner has given the fraudulent vendor the appearance of being the owner. In both cases third parties are deceived. In both, if the apparent ownership or apparent authority be sufficient to deceive, the innocent purchaser will be protected.

4. Factors' Acts. — A "factor" is an agent to whom goods are shipped to be sold by him on commission. The name "commission merchant" is perhaps more familiar than "factor." If goods are shipped for this

purpose to a factor, he, obviously, has the apparent and usually the real authority to sell. In the many thousands of business transactions of this character which daily take place, it would be very inconvenient to require every purchaser to investigate the exact extent of the authority of the commission merchant from whom he proposes to buy. In order to obviate this difficulty and facilitate business, various acts of legislation have been passed in England, and in this country, all of which contain substantially the same provisions, viz., that whenever goods have, in the regular course of trade, been intrusted to a factor, or commission merchant, for purposes of sale, the purchaser has a right to suppose that the factor has the authority to make an absolute sale; and may purchase without fear of loss, for the act says his title thus acquired shall be valid.

It must not be supposed, however, that these acts will protect a purchaser from any agent to whom goods have been sent for sale. The operation of the statutes is limited to cases where the transactions are strictly commercial in their character, *i.e.* where they concern only merchandise in the limited sense of the word; and they apply only to commission merchants or factors, — not to other persons who may be temporary agents for purposes of sale. In order to determine the exact effect of these acts, you should consult the statutes of the state in which you live.

CHAPTER III

WHEN THE TITLE TO THE GOODS PASSES

1. Title passes when Contract of Sale is Complete. — From our study of contracts you know when contractual rights and liabilities are fastened upon the contracting parties, viz., when the contract has been completed. In contracts dealt with by the branch of law which we are now studying, the object of the contract is to pass the title to property; consequently, this object is accomplished, and the title does pass as soon as the contract is made. You will remember that an ordinary contract is complete when offer and acceptance have taken place; but in the class of contracts which we are now discussing, a little more definite manifestation of the intention of the parties than mere oral offer and acceptance, ordinarily expressed by a “delivery” of the goods, is required.

2. What is meant by Delivery. — In interpreting the rule that there must be delivery before the title passes, you must not make the mistake of thinking that this means in all cases an actual physical transfer of the property sold. In many cases this would be impossible. Delivery may be defined as the mental surrender of the goods by the seller to the buyer. This mental surrender usually takes place when the goods are actually handed over; but, as we shall see, not always. Suppose you lease me a house, containing furniture which you sell to me. In that case it would, of course,

be absurd for you to take the furniture out of the house in order to deliver it to me, who am about to put it back again. In all such cases, if there is no intention to defraud creditors, such delivery, made mentally, is good.

If the vendor has set apart the specific goods which he intends to sell to the vendee, and has done every act which he has agreed to do in reference to them, and is merely waiting for the vendee to take them away, then obviously, even though the goods may still be on the premises of the seller, they may be said to be delivered and the title has passed.

But suppose A sells B one hundred head of cattle, and, by the terms of the agreement, A is to weigh them. He has not done so as yet. The sale is not complete. A sells B a certain bin of wheat. A is to measure it, and has not performed his agreement. Again, no title has passed. Whenever anything at all is left to be done by the vendor, the contract is incomplete.

Sometimes it happens that everything has been done, so far as setting aside the property is concerned, but that the precise amount of the cost of the article has not been calculated. This of itself will not prevent the delivery from being considered complete. A sold B several piles of lumber, which were set aside and marked. B was to take them away, measure them, and pay A a specified price per foot. Before the lumber was moved it was destroyed by fire. The question then arose as to who was the owner. The court decided that the title had passed to B, inasmuch as A had done everything he was called upon to do. The goods therefore could be properly said to have been delivered.

3. Where the Goods have not been specifically Set Aside.

—So far we have considered the question of delivery as applied to cases where specific goods were the subject of the contract. But sales may be effected of a part of a large quantity of goods, when the part sold has not been separated from the remainder. Suppose a dealer sells a number of rolls of paper, say one thousand, out of a stock containing ten thousand rolls. The question then might come up whether the title to the paper sold would pass, unless the actual number of rolls were separated from the remainder. The general rule is that it will not. The property to be sold must be definitely set aside, and specifically applied to the purpose of the sale, or no delivery, either mental or physical, is possible. There is an apparent exception to this in cases where all the property mingled together is of exactly the same kind; for instance, where wheat is stored in an elevator. If you own one thousand bushels in a certain elevator containing ten thousand bushels, you may sell your one thousand to me and pass the title by a delivery of your grain receipt only. This constitutes a symbolical delivery, and as all the grain is alike, no actual separation is necessary.

4. Mental Consent of both Parties must always be Present.

—While specific rules are valuable to aid us in our interpretation of the acts of the parties, yet it must not be lost sight of that, after all, the real question at issue is whether the contract of sale has been completed by a mental surrender of the goods by the seller to the buyer. This mental consent must always be present, and even though there may be an actual physical delivery, no title will pass unless it is. If the actual possession of the goods be obtained by fraud or trickery

on the part of the vendee, this will not operate to pass the title. Delivery of goods on board a train is usually deemed to be delivery to the buyer to whom the goods are shipped, and so the title passes at once; but if the vendor delivers the wrong article on board the train, the title to this will not pass, because the vendee never consented to have that article delivered to him.

CHAPTER IV

CONDITIONAL SALES

1. Where Title is not to pass until the Price is Paid. — Sometimes goods are sold under certain conditions, by which the title is to remain in the vendor until the purchase money is paid. The most familiar example of this is the sale on the installment plan. In such cases the chattel, a sewing-machine, piano, or whatever it may be, is delivered, but it is understood that until the last installment is paid the title is to remain in the vendor. If the question arises between the two original parties to the agreement, it is perfectly valid; that is, the title does not pass until payment, and the vendor can retake the goods. But suppose the rights of third parties should become involved. Suppose the buyer executes a chattel mortgage to a third party, covering a piano purchased under such conditions, or sells it to some third person, who buys innocently. In such a case the rule varies in different states. In the majority it is held that the buyer, having as yet acquired no title, can convey none. In others the conditional sale is treated as being fraudulent in its nature, and will not be strictly carried out when the rights of third parties intervene. In such states the innocent purchaser gets a perfect title.

2. Sale on Condition that the Buyer shall be pleased; Time Stipulations. — Sometimes goods are sent on approval, or on condition that they shall please the

buyer. In such a case the title does not pass to the vendee unless he has signified his intention to take the goods, or has permitted a reasonable time to elapse. It follows that he will not have to pay for them until one of these two conditions has been complied with.

With respect to time stipulations there is more difficulty. If it has been agreed that the goods are to be delivered by a certain time, it is always necessary to determine whether the parties really intend the time element to be a part of the contract. When we discussed this question under the subject of contracts, we there saw that where A sold B a ship, "then in the port of Amsterdam," the sale was held void because the time representation was deemed an essential term of the contract, and it had not been complied with. You will also remember that where an actor agreed to present himself for rehearsal four days before the first performance and appeared on the scene only two days before, the court thought the stipulation was not an essential part of the contract. Exactly the same principles apply to sales. If the court is convinced that the parties intend the time condition to be an integral part of the contract of sale, then no title passes unless the condition be fulfilled.

3. Effect of Failure to perform Conditions Precedent. — The conditions thus far discussed may be termed "conditions precedent." They are so called because until they are performed the contract is not complete and, consequently, no title to property sold may pass. As long, therefore, as you have not performed a condition precedent, which you are by the contract compelled to perform, you cannot sue the other party for any breach. Conversely, if he has failed to perform

his condition, you are under no liability whatever to him.

The performance of such conditions, however, may be waived. If you have purchased a suit of clothes which you expressly stipulate must be delivered by 4 P.M. on Wednesday or you will refuse to accept them, and if the vendor fails to deliver by the appointed time, you need not accept them; but if you do, notwithstanding the lateness of delivery, you thereby waive the condition, and are bound thereafter. One may, either by express words, or as in this illustration, by conduct, waive the performance of conditions precedent. If he has done so the contract will be valid in spite of the breach of the condition. But in the absence of waiver nothing will excuse from the performance. If you have agreed to deliver goods at a certain time, but are prevented by an earthquake or a great fire, you will not be excused on account of that; you have broken your condition and lost your sale.

4. Implied Conditions. — There are some conditions which, though not expressly agreed upon, have the effect of express conditions. One of these is said by some authorities to be the payment of the price, when no credit has been given to the buyer. If the parties have expressly agreed that no title will pass until payment, then payment is undoubtedly a condition precedent and the case is precisely similar to the one previously discussed where goods are sold on the installment plan. It is said by some writers that, when no credit has been given, there is an implied condition that, as between the buyer and seller, the title is not to pass until payment.

The theory of this conclusion is that if the sale is

understood to be for immediate payment, *i.e.*, if no credit be given, then the parties must have meant to make the payment of the price a condition precedent, which must be performed before the title can pass; if the contract of sale did not contemplate immediate payment, then a credit is implied, and the title, of course, passes on delivery. It is very doubtful if this reasoning be correct. It is preferable to say that the title does pass and the seller has his remedy against the vendee.

When goods are sold by description, it is an implied condition precedent that they shall conform to the description in kind and usually in quality. If you purchase from X a car-load of apples, you will not be obliged to accept oranges. Or if you bargain for Florida oranges and he ships you California oranges, you will not have to accept them, because he has not fulfilled his part of the contract; he has broken a condition precedent. As a general rule, the goods delivered must also be of a quality equal to the sample shown when the sale was contracted.

5. Condition Subsequent; Sale or Return. — Heretofore we have dealt exclusively with conditions precedent, the performance of which is necessary to the validity of the sale. We now meet a different kind of condition, known as a condition subsequent. Suppose A sells a horse to B, with the understanding that if it proves unsatisfactory it may be returned within one week. Within the week the horse dies without fault on B's part. The chances are that B will now find the horse unsatisfactory and will wish to repudiate the sale. The question here presented is whether the title had passed at once to B, or would not have done so until after the expiration of the week. This depends

upon the exact terms of the contract. If it stipulates that the title shall pass immediately, or if it clearly appears from the terms of the agreement that the parties did intend that the title should pass at once, then the sale is completed, and the provision for a return is a condition subsequent, — that is, a condition upon the performance of which the title will revert to the vendor. Viewed in this light, the title being in B, the loss would fall upon him, and he would be compelled to pay for the horse. Such contracts are, however, more frequently deemed to be contracts of bailment with an option to purchase. During the week the horse would, so to speak, be on trial. On this construction, the title would not pass until the time had expired or the purchaser had declared himself satisfied. In this case B would probably be allowed to repudiate his bargain.

CHAPTER V

WARRANTIES

1. Express Warranties. — A warranty differs from a condition in that it is not an essential element of the contract. It is a collateral stipulation. Its breach gives rise to an action for damages, but does not discharge the contract. Warranties are of two kinds, express and implied. An express warranty is one which, as the name indicates, has been expressly agreed upon by the parties. You sell me a suit of clothes and warrant it to be all wool. It turns out to be half cotton. The contract is not broken; the sale is good; but I may recover from you any damages which I have suffered by virtue of the breach of warranty. It is often very difficult to tell whether a representation made by one of the parties is intended to be a condition or a warranty. No absolute rule for determining can be laid down. The court will endeavor to ascertain the intention of the parties from the terms of the contract. If they intended it to be a term of contract, it is a condition. If they intended it to be a collateral stipulation, it is a warranty. Each case must be decided according to its own facts.

2. Implied Warranties of Title. — It is not always necessary that the vendor shall use express words to create a warranty. In America, if a man sells property as his own, even though he makes no express repre-

sentations about it, he impliedly warrants the title, *i.e.* agrees that if he is discovered not to have been the owner, he will make good any loss accruing to the purchaser by virtue of that fact. The same rule holds good in England at the present time, though formerly the law was otherwise in that country.

There are, however, some instances where the buyer is the one who assumes the risk of the title proving valueless. This is the case if he expressly takes this risk upon himself. It is also true where he purchases only the interest which the seller has. This transaction is an assignment rather than a sale. Again, if the purchaser at the time of the sale knows of a claim in the goods possessed by some third party, he buys at his peril. If they are sold at a time when they are not in the possession of the vendor, the title is at the risk of the vendee; lack of possession of the vendor should put the vendee on inquiry. Lastly, whenever goods are sold by the sheriff, or any person acting in an official capacity, he purports to sell only what the previous owner had; therefore, the buyer cannot complain if his title is defective.

3. Implied Warranty of Quality. — Where there has been a sale of specific goods which both parties have had an equal opportunity to examine, there is no implied warranty as to quality. The buyer is said to purchase at his own risk. "*Caveat Emptor*" — let the buyer beware — is the phrase which expresses the situation of the vendee.

But if the goods are sold with the understanding that they are to conform to a sample shown, we have what is called a sale by sample, and there is then an implied warranty that the goods shall conform to the sample

both in kind and quality. The vendor in such cases is bound to allow the vendee a fair opportunity to inspect the bulk, and if he finds it unequal to the sample he may refuse to receive it. In this respect, the stipulation that the goods shall conform to the sample seems more like a condition than a warranty. When articles intended for food are exposed for sale in the market, there is an implied warranty that they shall be fit for human consumption. This rule is not recognized in England, and not everywhere in this country. It is confined to cases where the articles are sold directly to the consumer, not when they are sold to other dealers.

4. Manufacturers' Implied Warranty. — When goods have been purchased from the manufacturer, he impliedly warrants their quality to the extent of guaranteeing them to have no latent defects. While he does not by implication warrant his wares to conform to a certain standard, yet, even though the purchaser may have inspected the articles he is buying, the manufacturer impliedly warrants them to contain no hidden defects arising from the process of manufacture.

A sold B a large quantity of flower seeds. Both parties inspected them, but of course neither could tell whether they would grow. They had been improperly cultivated, so that they were absolutely valueless. The court decided that the seller, who was also the producer, should make good the loss. Manufacturers also impliedly warrant the goods sold to be of their own manufacture and to be merchantable, — the latter, however, only when the purchaser relies on the judgment and honesty of the seller. If the manufacturer knows for what purpose the buyer intends to use the article, he impliedly warrants it to be fit for that purpose.

CHAPTER VI

MUTUAL REMEDIES OF THE PARTIES

1. Remedies of Unpaid Seller; Right of Lien. — Having discussed the nature of the contract of sale, we shall briefly examine the various rights of the parties, in case one of them is in default. In the first place, we shall suppose the buyer to be the one who has failed to carry out his part of the agreement. The unpaid vendor has two classes of remedies. He has a remedy against the buyer personally, and he has certain rights over the goods themselves, notwithstanding the fact that the title to them may have passed to the vendee.

If the title to the goods which are the subject-matter of a sale has passed to the vendee, a mental though not an actual delivery having taken place, the vendor is entitled to retain them in his own possession until he has been paid their price. This right to retain them until payment is called his “lien.” It exists, however, only where the sale is for cash. If the vendor sells on credit he must, on the demand of the vendee, give up the goods provided the demand be made at a time before the credit has expired; if the demand is not made until after the credit has expired, then the vendor may hold the goods until payment, just as he may where the sale is for cash.

If the vendor retains the goods by virtue of his lien and the vendee still neglects to pay, the vendor may sell the goods to some third party. It often happens

that the continued retention of the goods would result in the loss of their value, as in cases where they are of a perishable nature. If the vendor could do nothing but hold them until the purchase money was paid, he would find himself with no security at all for its payment. It is well settled in America that the vendor may exercise his right of "resale." When he does, he acts as the agent of the vendee. If he sells for more than the price the vendee agreed to give, he must pay the excess to him, less his own loss. If he sells for less than the price he was to receive, he is entitled to sue the vendee for the difference.

2. Right of Stoppage in Transitu. — There is still another right over the goods which the vendor has, notwithstanding the fact that the title to them may have passed to the vendee. This is a peculiar privilege known as the right of "*Stoppage in Transitu.*" It has already been explained how a delivery of goods to a railroad or to any "common carrier," is a delivery to the vendee and operates to pass the title; but even then the vendor has a right to retake the goods while they are on the way, if he does so before they have actually come into the possession of the vendee. This right may be exercised only when the vendee has become insolvent and the vendor would, in all probability, be unable to collect the price of his shipment.

A, in New York, sold a bill of goods to B, in Rio Janeiro. They were shipped on the brig *Betsy Jane*. Two days after the vessel sailed, A was advised by cable that B had become a bankrupt. He thereupon authorized his agent to meet the brig in the harbor of the city and to notify her captain, before the vessel came to anchor, not to deliver the goods to the consignee. This

was done, and B's assignee in bankruptcy, who could claim all of B's property, had no rights over the cargo.

It is essential that the goods be intercepted *in transitu*. If they reach their ultimate destination before the order reaches the carrier, the title has passed absolutely and the vendor has lost all his rights in the goods themselves. It has been decided that if the vessel comes to anchor in the port of destination, the journey of the goods is at an end, and the order will then be too late.

3. Remedies of Vendor against Vendee Personally. — We have discussed so far only the remedies which the vendor has over the goods which were the subject-matter of the sale, and the title to which had passed to the vendee, although they were still in the physical possession of the vendor. In cases where the title has not passed, obviously the vendor is at full liberty to do what he pleases with the goods. Until he is paid, he cannot be compelled to give them up. But now we come to the situation where the title has passed and the goods have been actually delivered into the possession of the vendee. In such a case the vendor has no remedy against the goods — he must sue the vendee for their price. If the vendee refuses to accept the goods, having decided to repudiate his bargain, the vendor may sue him, not for the price of the goods, for the title has not passed, but for damages arising from the breach of contract. He may recover a sum sufficient to compensate him for all the loss sustained on account of the breach, provided that loss could reasonably be expected to result from it.

4. Remedies of Vendee where Vendor refuses to Perform. — We now reverse the situation, — suppose the vendor to be in default, and ask what are the remedies of the

vendee. If the vendor has refused to perform his part, and the vendee has suffered loss in consequence, the latter may sue the former for damages for breach of contract. The amount recoverable is the amount of actual loss naturally resulting from the breach. If the vendee has been compelled to go into the market and pay a higher price for the same goods, he may recover the difference between the price which he actually paid, and the amount he would have paid had he bought according to the contract.

Again, suppose that the contract of sale has been completed so that the title to the goods has passed to the vendee, but that the vendor refuses to deliver them to him. If, in any case, one man is the owner of property and some one else wrongfully takes it from him or destroys it, or if, having possession of it rightfully, he wrongfully appropriates it to his own use, he may be sued for its value—he has been guilty of the wrong known as “conversion.” If the title to goods which are the subject-matter of a sale has passed to the vendee, and the vendor wrongfully refuses to give them up, he has wrongfully appropriated to his own use property belonging to the vendee, and the latter may sue him and recover its full value, with damages for its detention.

5. Suit for Specific Performance.—Another remedy which may be resorted to by the vendee, is a suit in equity for the specific performance of the contract of sale. This remedy is equally open to both parties, but, as a rule, damages will compensate a vendor for his loss, since all that he can lose will be the profits of the sale. But sometimes damages will not compensate the vendee, and, as we saw when we were discussing contracts, if damages will not compensate a man for a breach of

contract, he may go into equity and force the opposite party to carry it out specifically. This rule applies to contracts of sale, as well as to other contracts. If the article to be sold is of such a nature that damages cannot compensate the vendee for its loss, then he may specifically enforce it.

B was a dealer in fish. The fish-skins and offal were valuable for the manufacture of glue. A offered to put up a glue factory and purchase all of B's fish, if the latter would enter into a contract to sell him all the skins and offal at a certain specified price for a long term of years. The contract was made, the factory erected, and all went smoothly until a third party came along and offered B a higher price. He then refused to sell to A any longer. A went into equity and asked for specific performance. The court granted it. They said no damages could compensate A for the loss of his business, and that would have been the result of B's continued refusal to perform, because no other fish-skins could be purchased anywhere within reach of A's factory.

Whenever the article contracted to be sold is of peculiar value to the plaintiff, so that its loss cannot be compensated by money alone, the court will specifically enforce the sale. Thus, a sale of a valuable altar-piece, treasured as an heirloom, was enforced in equity by the vendee, who, being a member of the family in which the heirloom belonged, had a special reason for desiring to purchase it. Money alone would not compensate him for its loss. No other like it could be purchased.

6. Remedies of Vendee for Breach of Warranty. — So far we have dealt only with remedies for a breach of

the contract of sale. But while that agreement has been performed, there may have been a breach of some collateral stipulation, termed a "warranty." If the sale has been completed and the goods delivered to the vendee, he may not, as a rule, tender them back and refuse to pay for them, upon discovering that they are not equal to the warranty. He may sue for damages for breach of the warranty and recover any loss suffered therefrom, or he may set up such damage in defence, when he is sued for the purchase price, and will then be required to pay the difference only. If the contract of sale has not yet been performed, that is, if the goods have not yet been delivered, and the vendee finds out by an examination of them that they do not equal in quality the sample to which they were to conform, or if he finds that they do not answer to the description given of them, he is then usually at liberty to refuse to accept them. He may do this, however, only in cases where the stipulation as to quality really partakes of the nature of a condition. In the case of an ordinary warranty, his only remedy is either a suit for damages or a reduction of the price by the amount of his loss.

PART IV

NEGOTIABLE CONTRACTS

CHAPTER I

ESSENTIAL CHARACTERISTICS OF A PROMISSORY NOTE

1. General Nature of Negotiable Contracts. — Having completed the discussion of the general nature and formation of contracts and the more particular discussion of sales, we will now investigate “negotiable contracts.” These contracts are always written. They consist of “Promissory Notes” and “Bills of Exchange,” usually termed drafts by merchants. Their peculiar feature is the fact that they may be transferred at will from one person to another. They circulate from hand to hand almost as freely as money, and this is what we mean when we use the word “negotiable.” When one transfers a contract of this nature to some one else, he is said to negotiate it.

2. Custom of Merchants. — The rules which govern this particular class of contracts were, in the first instance, derived from a certain branch of law which is usually referred to as the “Custom of Merchants.” When commerce began to be one of the most important means of livelihood, it became necessary that certain

rules or laws common to all countries should be laid down to govern transactions between merchants who lived in different sections of the world. A merchant in England trading with a merchant in Italy would, in case of a dispute between them, be sure to get into difficulties over the question as to which law was to govern the transaction. In order to obviate these difficulties to some extent, the rules comprised in the "Custom of Merchants" were evolved.

Among the most important of these rules are those which govern the purchase and sale of negotiable paper. When business men in different parts of the world are dealing with each other, they use bills of exchange and promissory notes almost exclusively for transferring values. While the common law now governs these instruments and the various situations which arise in connection with them, it is interesting to know that the common law decisions were originally based upon this peculiar system of rules which we have referred to as the "Custom of Merchants." Laws governing negotiable paper and other transactions which particularly concern merchant and merchant are, therefore, very much the same the world over, because the laws in all countries were founded, to a greater or less extent, upon this same system of rules.

3. Definition of a Promissory Note. — Negotiable contracts consist of promissory notes and bills of exchange. The first thing to determine is what instruments are bills and what are notes. Having ascertained the character of the paper, we are then in a position to apply the rules peculiar to it. A promissory note is a written, unconditional promise, made by one or more parties, to pay a certain sum of money to the order of

some other party or parties, at a definite time. The one who promises to pay by affixing his signature to the instrument is called the "maker" of the note; the one to whom the money is to be paid is called the "payee." Hereafter when we refer to the man who promises we shall call him the "maker," and when we refer to the one to whom the promise is made, we shall call him the "payee." The usual form of a promissory note is as follows:—

\$ 500.	Philadelphia, June 7 1899
<u>Eight months</u> after date <u>I</u> promise to pay	
to the order of <u>H. H. White,</u>	
<u>Five Hundred</u>	<u>Dollars,</u>
at <u>the Merchants' Bank of Philadelphia</u>	
<u>with interest at 6%.</u>	
<i>Without defalcation, for value received.</i>	
No. <u>410.</u>	Due <u>2/7/1900.</u> <u>John H. Waite.</u>

4. Note must contain a Promise. — We must discuss more particularly the essential elements of a promissory note, which are only briefly indicated in the definition. In the first place, it must contain an unconditional promise to pay. The point to be insisted upon is, that the words must constitute a promise of payment, as distinguished from a request or a mere recognition of an existing debt. Thus, a written instrument saying, "I O U eight guineas," was decided not to constitute a promise,—it merely admitted the indebtedness of the

signer. On the other hand, the words, "I O U twenty pounds, to be paid on demand," would have constituted a promise. The phrase "to be paid on demand" contains a clear indication that the maker of the note considers himself to be bound to pay at the instance of the opposite party.

5. Promise must be Unconditional. — Not only must the promise be an actual promise as distinguished from a request, or an acknowledgment of indebtedness, but it must be an unconditional one. A paper reading, "I promise to pay one hundred dollars if my brother does not," would not constitute a promissory note. The promise is here conditional upon the failure of the brother of the maker to pay the amount. It is really an undertaking by one man to be surety for another. A gave B an instrument which read, "I promise to pay one hundred dollars out of the income of my farm." That instrument could not be a negotiable note. The promise was conditional upon the income arising from the farm; there might be no income, in which case there would be no obligation to pay.

6. Promise must be Single. — Not only must the note contain a promise which is unconditional, but it must contain no other promise or agreement on the part of the maker, beyond that of payment. To constitute a negotiable contract, the law requires that it shall contain but a single promise. It is, of course, entirely possible to have a paper which contains more than one promise and which will bind the maker; but such an instrument will not possess the character of negotiability unless it conforms in all respects to the essential elements which we are now enumerating. When we say a certain instrument is not a promissory note, we

mean merely that it is not a negotiable instrument. A signed an instrument in which he agreed to pay B the sum of five hundred dollars, and also to deliver up to B certain horses in his possession. The instrument was decided not to be a promissory note because it contained not only a promise to pay money, but also a promise to do something else, which destroyed its negotiability.

7. Promise must be for the Payment of Money. — If the promise contained in the note is a promise to pay something other than money, as a promise to deliver one hundred bushels of potatoes, the instrument is not negotiable. By “money” is meant the medium of exchange which is legal tender at the place where the note is to be paid. If I execute an instrument in which I agree to pay you one hundred Spanish milled dollars, that would not be a promissory note, as Spanish milled dollars are not legal tender in this country. This contract would be an agreement to deliver a specific chattel. The promise in the United States is ordinarily to pay in dollars, but a promise to pay specifically in United States currency, or in silver dollars, or in gold dollars, would constitute a negotiable contract, for all of these are money, since they are legal tender in this country. A promise, on the other hand, to pay in the United States one hundred pounds of English money would not constitute a promissory note.

8. Amount and Time of Payment must be definite. — The amount named in the note must be a definite one. There must be no uncertainty as to the obligation of the maker. If I execute an instrument by which I obligate myself to pay you five hundred dollars one year from date, and all other sums which at that time

I may be owing to you, it would not be negotiable because the obligation of the maker is uncertain. If such an instrument were negotiable, that is, if it could circulate like money, it would give rise to a great deal of inconvenience, because the persons who might purchase it would not know how much it was worth to them. Inasmuch as such paper is intended to pass through the hands of a number of people, it should contain on its face an exact statement of its value. No article could be a successful medium of exchange unless this were true, because no one would know whether or not he could accept it in payment for value delivered. That is the reason business becomes practically bankrupt when paper money which is in circulation becomes of doubtful value. Business men will not accept it because they do not know how much it is worth. If, therefore, the amount of the note, or the character of the promise, or the time of payment be uncertain, the law will not treat it as being a negotiable contract. A young man who had gotten into debt desired to raise money to discharge his obligations; he was his father's heir, and gave a note to a money-lender in which he agreed to pay him a certain amount of money, "ten days after the death of my father." The note was not negotiable; for, while it was perfectly certain that the time would eventually arrive when the note would fall due, yet no one could tell how long a period might intervene prior to that day.

9. Parties must be definite and Words of Negotiability present. — In order that all the elements of negotiability may attach, it must clearly appear upon the face of the instrument who is the payee and who is the maker of the note, otherwise, as you can readily see, there would

be no means of determining its value, as, after all, the chief point to be considered is the responsibility of the maker.

Even if the preceding elements be present, still the obligation will not be negotiable unless there be words of negotiability; that is, words indicating the purpose of the parties that the paper shall be transferable from hand to hand. The usual words are, as may be seen from the form given above, "or order," or "pay to the order of," thus indicating that the maker agrees to pay to any one designated by the payee. Or the note may read "Pay to John Smith or bearer," in which case any one who has possession of the note may collect it from the maker. It is not absolutely necessary to use these exact words, but some words indicating negotiability must be present.

When all these elements are combined in one instrument, we have what is technically called a promissory note. As we shall see hereafter, there is a great difference between the obligation of parties to an instrument which is technically a promissory note, and the parties to an instrument which is an ordinary promise to pay. In the one case the liability of the parties is governed by the peculiar rules which we have above referred to, founded upon the "Custom of Merchants"; in the other case their liability is governed solely by the common law rules relating to contracts.

CHAPTER II

ESSENTIAL CHARACTERISTICS OF A BILL OF EXCHANGE

1. **The Purpose of a Bill of Exchange.** — We now come to the second kind of negotiable contracts, which are known as “Bills of Exchange.” The purpose of a bill of exchange is to enable merchants in different parts of the world to pay for goods which they have purchased, without actually shipping the money to their creditors. If A, a merchant in New York, desires to pay various merchants in England for consignments of goods shipped to him, and should send the cash to each one, it would involve a great deal of trouble, as he would be obliged to purchase English money here, or else ship American money to England for the purchase of English money, with which to pay the debt. In either case he must bear the cost of shipment.

To obviate this he makes a permanent arrangement with a banker, say in London. He deposits funds with him or obtains a “line of credit.” Then when he desires to pay for a consignment of goods, he sends to the foreign dealer a bill of exchange. This bill of exchange is a written order to his banker, directing him to pay to the order of X, the merchant, the amount of the bill. The latter then goes to the banker and presents the bill to him. If everything is correct and the banker has funds of the New York merchant for that purpose, he writes across the face of the bill “Accepted,” with the date, and signs his name. He then puts aside enough money

belonging to the New York merchant to meet this bill when due. When that date arrives he pays the amount named in the instrument.

2. Essentials of a Bill of Exchange. — A bill of exchange may be defined as a written order by which A directs B to pay a certain sum of money, named therein, to the order of C. A, who signs the order, is called the drawer; B, the banker to whom the order is directed, is called the drawee until he accepts, after which he is called the acceptor. The party, C, to whom the money is to be paid is called the payee. Bills of exchange which are to be sent across the sea, or to far distant points, are usually issued in “duplicate” or in “triplicate.” That is, three copies of the same instrument are executed, each one being numbered and containing a statement that if it be paid first, the other two are not to be paid. The one which first comes to hand is then used, and the others become of no validity. The usual form of such a bill is as follows:—

Exchange for £1000 Stg.

Philadelphia, Oct. 7 18 99

*Thirty days after sight of this Second
of Exchange (first and third of same tenor and
date unpaid) pay to the order of John Smith*

*One Thousand Pounds Sterling for value
received, and place the same to the account of*

*To M. M. Brown & Sons,
Bankers, London, England.*

Henry Jones.

No. 892

The one given is No. 2. The others would be just like it, except the numbers. The observations which were made concerning the essential characteristics of a promissory note, will also apply to a bill of exchange. It must contain an absolute order, not a mere request. "Mr. A will much oblige Mr. B by paying Mr. C one hundred dollars," would not be a bill of exchange. If the words "or order" were present, however, this would be deemed a sufficient indication of an absolute order, and the instrument would be negotiable. As in the case of the promissory note, the bill must be for the payment of money and the order must not be coupled with an order to do something else. It must be definite as to amount and time of payment and identity of the parties, and must contain words of negotiability.

3. Bill or Note not Complete until Delivered.—A bill or note does not become binding until it has been delivered to the proper parties. Suppose I write out and sign a promissory note in your favor, but retain it in my own possession, intending to give it to you at some future time, when you are to deliver to me a sum of money. While the note is still in my possession it is of no binding force upon me, as I have not really completed the execution of it until I deliver it to you. The same rule applies to a bill of exchange; until it is sent to the payee it confers no rights upon any of the parties.

4. Ambiguous Instruments.—It sometimes happens that a paper is drawn in such a way that it is difficult to tell what it really is. In such a case the court will interpret the instrument as nearly as may be according to the intention of the parties. If it is of the opinion that they intended the instrument to be a bill of

exchange, it will so construe. If it is of the opinion that they intended it to be a promissory note, it will construe it to be one. A wrote an instrument in the following form, which he gave to C:—

Oct. 9, 1901.

To B.

I promise to pay to the order of C one hundred dollars, two months after date.

(Signed) A.

The question was whether this was a promissory note or a bill of exchange. It had been presented to B, and B had written his name across it, accepting. It was argued that A meant to order B to pay one hundred dollars to C, but that he ignorantly wrote, "I promise to" before pay, and these words should be disregarded. On the other hand, it was pointed out that the body of the instrument contained a clear promise to pay on the part of A, and the fact that the instrument was directed to B, and that he accepted it, made no difference. The court decided that the holder might elect to treat it as either, and as he had sued upon it as a bill of exchange, he was allowed to recover upon that theory.

In both bill and note the essential words are the order or promise, the words of negotiability, and the signature. Everything else may be dispensed with without destroying the negotiable character of the paper. The date may be proven by oral evidence; if no time is stated in the instrument it is payable on demand. Even the name of the payee may be omitted, in which case the bill or note is payable to bearer, but the other characteristics must be present.

CHAPTER III

HOW THE ACCEPTANCE MUST BE MADE

1. **The Acceptance should be made in Writing across the Face of the Bill.** — The bill of exchange should be presented to the person to whom it is directed, the drawee. If he has funds of the drawer for that purpose he promises to pay the amount, when due, and, to indicate that fact, writes his name across the face of the bill. This act is called his “acceptance.” From that time he is called the “acceptor.” Should the drawee for any reason fail or refuse to accept the bill, it is said to be dishonored, and the holder may charge the drawer with the amount. That phase of the question will be discussed later; the question immediately before us is, How may the acceptance be made?

It should, as a rule, be made in writing across the face of the instrument. This is not, however, always necessary. In England all bills of exchange must be accepted in writing. In this country different rules prevail in the different states. In Pennsylvania all bills of exchange for amounts greater than twenty dollars must be accepted in writing; but bills for a less amount may be accepted orally. Nearly all states have similar statutory rules. In some parts of this country a separate promise to pay a bill of exchange which has not yet been drawn up, will bind the acceptor. Suppose I wish to draw a bill of exchange

upon you, and I write you a letter asking if you will pay such a bill in case I draw it. You write back, saying that you will. I then draw up the bill, directing it to you. That promise of yours will bind you in some states in this country, but not in others. In England it will not bind you. There are statutory regulations concerning this matter in a number of the states.

2. What the Acceptance Means. — By the act of writing his name across the face of the bill, the drawee promises to pay the amount. This promise is the essential part of the acceptance, and while the latter may be made in an informal manner, it must clearly contain this promise to pay. If the drawee accepts conditionally, he makes a conditional promise to pay, which may or may not destroy the negotiability of the instrument, depending upon its nature. If the drawee accepts before the date of payment, he promises to pay when that time arrives. If he accepts after the date of payment, he promises to pay on demand. The only proper person to accept a bill of exchange is the one to whom it is addressed, viz., the drawee; if a stranger should accept a bill he might be held responsible for his promise to pay, but the instrument would lose its negotiable character.

CHAPTER IV

HOW NEGOTIABLE PAPER CIRCULATES

1. **Indorsement Necessary.** — It has already been pointed out that promissory notes and bills of exchange circulate from hand to hand almost as freely as money. This is the peculiar function of negotiable contracts, and they are made with the express purpose of performing this service. There is, however, a difference between the manner in which money circulates, and the manner in which negotiable paper circulates. Money changes hands and ownership merely by delivery. If I desire to pay you a debt of one hundred dollars and hand you one hundred dollars in United States currency, the title to the currency passes to you by the act of delivery. It is not necessary for me to put my name on the paper or to go through a formality of any kind. But if I am the payee of a bill of exchange, and the bill reads : —

June 26, 1901.

To A.

Ninety days after date pay one hundred dollars to B, or order.

(Signed) C.

On the face of the instrument, B is the one who is entitled to the one hundred dollars. If B wishes to pay a debt which he owes X, and desires to pay it with this bill of exchange, he cannot simply hand the bill over to X, for if X should present the bill he could not

get the money, as A is not ordered to pay it to him. But this is negotiable paper and does circulate from hand to hand. How, then, shall B get over his difficulty? He writes on the back of the instrument, "To A, Pay the within to X or order, (signed) C." Or he may simply write, "Pay to X or order," or, in some cases, merely sign his name on the back. If he does the latter, he is said to indorse the bill or note in blank, and by so doing he orders the acceptor or maker, as the case may be, to pay the amount of the instrument to the bearer. The latter may, if he chooses, fill in his own name, so that it will appear that the original indorsement was made to his order.

2. How the Indorsement should be Made. — When the holder of a note writes on the back of it an order directing the maker to pay the amount to some other person, his action is called "indorsing" the note. His signature on the back is his indorsement; by putting it there he has subjected himself to certain liabilities, which we will discuss later. After this time he is called an "indorser," and the one to whom he has indorsed the bill is called an "indorsee."

The indorsement must be in writing on the bill or note. This is an absolute rule. If the indorsee wishes to transfer it to some other person, he may indorse it over to him in the same way, and the second indorsee may do the same to still another, and so on. The only person who can properly indorse a bill or note is the one who at that time is the owner of it. Obviously, this may be either the payee himself or some subsequent indorsee, as no one else can be the owner and no one but the owner can transfer the title to another person.

A. Irregular Indorsers. — It sometimes happens, however, that a stranger to the instrument will put his name on the back of it to give it credit. Suppose a promissory note is executed in the following form: —

Two months after date I promise to pay to the order of A two hundred dollars.

(Signed) B.

A wishes to negotiate, or, in other words, to sell the note, in order to raise funds. He offers it to W, who distrusts the credit of both A and B, and refuses to buy it, unless X will also put his name upon it. X, therefore, in order to give the note credit, signs his name on the back. A signs after him, and the note is delivered over to W. X's indorsement there is manifestly irregular. He was not the owner of the note at the time he signed, for, as his name appears before that of the payee, he never could have had title to it. He is what is known as an "anomalous" indorser. There is a conflict of authority as to the liability of such indorsers. In England an anomalous indorser of a bill would be deemed to be in the position of the drawer of a new bill of exchange, and would be liable accordingly. The anomalous indorser of a note would not be liable at all. In America the rule varies in different states. In Massachusetts, if the anomalous indorser signs his name at the time the note is made, he is held liable as a joint maker. If he does not sign until some time afterward, he is chargeable as a guarantor of the credit of the maker, but not as an indorser. In some of the other states he is not chargeable at all, and in still others he is held to the responsibility of a second indorser.

CHAPTER V

LIABILITY OF THE MAKER OF A NOTE

1. **In General.** — The maker of a note promises unconditionally to pay the amount of its face to the payee, or any subsequent holder, at the date when the instrument is due, or at any time thereafter. His liability is absolute, and he can be discharged from it only by payment, or by the lapse of the statutory period of limitations, or by bankruptcy. This promise is unconditional so far as the maker himself is concerned, but he is not compelled to pay, as a general rule, until the holder of the note presents it for payment and surrenders it to him. Inasmuch as the note is negotiable, if the maker should pay it without its being given up to him, he would run the risk of being compelled to pay it a second time. As we shall see later, it is no defence for the maker of a note to allege that he has already paid the instrument, if payment is now being demanded by a *bona fide* purchaser who gave value for it, provided he did not know that it had been paid, and if he had purchased it before maturity.

A. Owner of a Lost Instrument may Recover in Equity. — It often happens that the owner of a bill or note seeks to recover from the maker or acceptor when he does not have it in his possession, by reason of the fact that it has been lost or destroyed. Take the case where the holder comes into court, proves that he was

the owner of a note, that the man whom he is suing was the maker, proves its amount, and that he has lost it, and asks for judgment. If he were permitted to recover, the maker might be compelled to pay the note a second time. It is possible that the bill may be found by some third party, who may sell it to some one else for a valuable consideration, and in that case the purchaser could recover against the maker. In most cases, however, the bill either has been destroyed or else it has been lost beyond all probability of its ever being found again. Under such circumstances, it seems unjust not to permit the one who is clearly entitled to the money to recover. At the same time, it does not seem fair to subject the maker to the risk of having to pay a second time. In order to reach as fair a result as possible, courts of equity, in some states courts of law also, will permit the owner of a lost instrument to recover, provided he has proven all the facts which have been indicated, and gives a bond by which he insures the maker against any loss on account of having to pay the note or bill a second time. Without giving such a bond of indemnity, however, the owner of a lost instrument is never permitted to recover.

B. Liability of Joint Makers.—Thus far we have spoken only of the liability of the sole maker of a note or acceptor of a bill; that is, of the cases where one party only has signed the instrument. But suppose two persons, A and B, sign a promissory note, by which they obligate themselves to pay C a sum of money. This note may be what is known as a “joint” note, or it may be a “joint and several” note, depending upon the wording. If it reads, “we jointly promise to pay,” or “we jointly and severally promise to

pay," the nature of the liability is perfectly clear. If nothing is said about the nature of it, the two parties having signed the instrument, it is a joint note. In some states statutes have been passed, providing that all notes signed by two parties shall be deemed to be joint and several notes, even though they may be expressly declared to be joint.

The distinction between the two involves the nature of the remedy. If the note be joint the makers make an indivisible promise to pay. There are several promisors, but only one promise. When the holder of the note sues, he may join all the makers as defendants or sue one only. As there is only one promise there may be only one suit; consequently, if he sues one, and subsequently finds him to be insolvent and therefore gets nothing, he cannot sue any other — his right of action is gone. But if the note be joint and several, each signer has made a separate promise to pay the full amount, as well as a common promise to pay in conjunction with his fellows; therefore the holder of the instrument may sue each one successively until he is able to collect the full amount.

CHAPTER VI

LIABILITY OF THE ACCEPTOR OF A BILL OF EXCHANGE

1. **In General.** — Until he accepts the bill of exchange, the drawee is under no liability. The bill is an order to him to pay the amount to the payee, but until he signifies his willingness to do so, he is not a party to the contract. After he accepts, however, he is under an absolute responsibility to pay the amount of the face of the bill to the holder at maturity. If he fails at that time he must pay thereafter, with interest. If the drawer is compelled to take back the bill, by reason of the failure of the acceptor to pay it at maturity, the latter is under a duty to pay the drawer not only the amount of the bill with interest, but also any incidental expenses which he may have incurred by reason of the default of the acceptor. Sometimes the drawee accepts conditionally and not absolutely, as where one accepted "half in money and half in bills." In such a case he is responsible only according to the terms of the acceptance.

A. Acceptor for "Honor." — The drawee is the only one who can accept a bill in the regular way. Sometimes, however, it happens that the bill is presented to the drawee and acceptance is refused. The bill is then "protested," *i.e.*, formally declared to be dishonored by a notary public; and the next step of the

holder would ordinarily be to sue the drawer. But if X, a friend of the drawer, has reason to believe that the drawee will ultimately pay, and in the meantime wishes to protect the drawer from suit, he may accept the bill "supra protest," for the honor of the drawer. This means that he agrees to pay the bill ultimately; if it is again presented to the drawee at maturity, and payment is again refused, it is again protested, and he is duly notified of these facts.

As we shall see, when we discuss the secondary liability of the parties to instruments of this kind, viz., drawers and indorsers, there are a number of formalities that must be complied with in order to hold them. An ordinary acceptor, or maker, is the principal debtor and has absolutely bound himself to pay; consequently the observance of these formalities is not so essential. But if a man agrees to pay only in case some one else does not, he stands in the relation of a surety, and cannot be charged unless the proper formalities of protest and notice are observed. In the case before us, X is not the principal debtor. He has come forward to save the credit of the drawer, and has promised to pay if the drawee a second time refuses. If this happens, the holder is bound to have the bill promptly protested a second time, and to give due notice to the acceptor for honor, X. If he fails in any particular, X is discharged from liability.

CHAPTER VII

LIABILITY OF DRAWER AND INDORSER

1. **Drawer and Indorser secondarily Liable.** — So far, we have been discussing the responsibility of the parties who are primarily liable on a bill of exchange or promissory note. When we say a man is primarily liable, we mean that he is the principal debtor — the one who is bound both legally and morally to pay the amount owing. When we say a man is secondarily liable, we mean that he promises to pay, in case some one else does not. The drawer of a bill of exchange, and the indorser of a bill or note, are parties who are secondarily liable. The responsibilities of the drawer of a bill and the indorser of either a bill or note are practically identical, and we may discuss them at the same time. It may be understood, when we use only one term for the sake of illustration, that the same principles will apply to the other.

2. **What the Drawer and Indorser Promise to Do.** — When the drawer of a bill signs his name to the instrument, he promises the payee, and all subsequent holders of the bill, that the acceptor shall pay its amount at maturity, and agrees that in case the acceptor does not pay, he, the drawer, will do so, provided certain conditions, to be hereafter discussed, have been complied with. Suppose you own a bill, not yet due, which you wish to use in payment of a debt which you owe to A, and you therefore indorse the bill over to him. You

have not only transferred the ownership to him, but you have also agreed that he shall suffer no loss by reason of the default of the acceptor of that bill. In other words, you guarantee that the bill will be paid at maturity, with the understanding that if it is not, you will make good whatever loss may have been suffered by any subsequent holder.

In the same way, A may indorse to B, and B to C, and C to D. Each indorser promises all subsequent indorseees that they shall suffer no loss by reason of default in the payment of the instrument which they have purchased. These parties, by the act of putting their names on the paper, agree that they will fully indemnify the holder and, if necessary, pay not only the face value of the instrument, but also any expense which the purchaser may have incurred by virtue of the non-payment of the bill by the acceptor. It should be mentioned, in this connection, that the holder of a bill or note may, if he chooses, pass the title to it without subjecting himself to any liability at all. He may do this by indorsing "without recourse." That is, by adding these two words after his signature. In such a case he has no liability at all.

3. Conditions upon which the Drawer and Indorser are Liable. — The drawer and indorser are secondarily and not primarily liable, and their responsibility depends upon certain conditions, which must be faithfully performed by the holder. In the first place, the holder of the instrument must take it when due to the maker or acceptor, as the case may be, and formally demand payment. This is what is known as "presentment." In the second place, it is necessary for the holder to send a prompt notice of the non-payment of the bill to the drawers or indorsers whom he intends to hold responsi-

ble. If he fails to give notice to them, they are entirely freed from liability.

In order to determine what is a prompt notice, the court will take into consideration all the circumstances of the case. If the parties all live in the same city, and no good reason is shown why the notice should not be sent at once, only one day is allowed after the bill or note has been dishonored. If the parties neglect to send the notice on time, it is too late to charge the drawer or indorser.

If the bill of exchange is a foreign bill, that is, if it be one drawn upon a man who lives in another country or another state, it must also be "protested" before the drawer or indorser can be held responsible. A "protest" is a formal statement which must be made by a notary public, and which sets forth the fact that the bill therein described has been presented for payment, and that payment has been refused, concluding with a formal protest, as it is called, against the bill, to which is affixed the signature and seal of the notary. It is not absolutely necessary for domestic bills of exchange to be protested, but the usual practice is that all bills of exchange and promissory notes shall be protested as soon as they are dishonored, for the protest is the best evidence of the fact of dishonor. If all these conditions have been complied with, then the drawer or indorser may be held responsible for the payment of the instrument, together with incidental expenses which the holder may have incurred by the reason of its non-payment at maturity.

4. Irregularity in the Instrument does not Excuse the Drawer or Indorser. — Subject to the performance of the foregoing conditions, the promise of the drawer or in-

dorser is unconditional. It is an absolute promise made to subsequent holders of that particular instrument, that they shall suffer no loss by reason of purchasing the paper on which the drawer or indorser has placed his signature. Suppose I have in my possession a forged bill of exchange, which has been indorsed to me by some one else. Of course that instrument is of no value whatever, — it has no legal existence because it was never signed by the person whose name appears upon it. If I sell that instrument to you, placing my name upon the back as indorser, and you, after presenting it for payment (payment of course having been refused), seek to charge me for your loss, I will have to pay. Remembering that my promise to you is unconditional, it is clear enough that I will be compelled to reimburse you for whatever you have paid for the bill, and any expense which you may have suffered. No irregularity in the written instrument which has occurred prior to the indorsement of the bill, will excuse the indorser from his promise to subsequent holders.

5. Remedy of One Indorser against a Prior Indorser. — You will remember that each indorser promises all subsequent holders of the instrument that they shall suffer no loss by reason of the default of the principal debtor. Each indorser, therefore (except the first one), while he is responsible to subsequent indorseees, has a remedy against any prior indorser. Suppose A is the maker of a note. B is the payee. B indorses to C. B then becomes the first indorser. C indorses to D. C is the second indorser. D indorses to E, and E to F. If F presents the note to the maker, A, on the proper day, and payment is refused, he may, by sending notice to E, hold him responsible for his in-

demnification. If F thinks either D or C or B a more reliable person than E, he may charge either one of them by sending the proper notice; for each indorser has promised to indemnify not only his immediate indorsee, but any of the subsequent holders who may suffer a loss. If F recovers against B, then C, D, and E are discharged from all responsibility.

Now suppose F charges E, sues him, and recovers. If E has promptly communicated the notice to D he has a "remedy over," as it is called, against D. D then may indemnify himself by charging C, C by charging B, and B may recover the full amount from A, the original maker, provided, which is not likely, the latter is solvent. The maker's responsibility to B does not, of course, depend upon any conditions, and it terminates only with the statutory period of limitations. From this you can see the theory of indorsement of negotiable paper. We have a sort of endless chain of liability. All except the maker of a note, or the acceptor of a bill, are only secondarily liable. Their responsibility depends upon the performance of the conditions to which we have referred.

A. Presentment. — We will now take up more in detail the fulfillment of the various conditions which are necessary before the drawer or the indorser may be charged. We have already explained that presentment means taking the bill or note to the maker or acceptor, and formally demanding payment. It is also customary to present a bill of exchange to the drawee for acceptance. This step is not, however, absolutely necessary in order to charge the drawer or indorser unless the bill is one payable at or after sight. In such a case, — and, indeed, most bills are so drawn, — presentment for acceptance

is a necessity. If a bill directed to A and signed "C," reads, "Pay B sixty days after sight one hundred dollars," that means that C, the drawer, does not order A to pay till sixty days after the bill is presented to him for acceptance, or sixty days after he has had "sight," *i.e.*, has seen the bill. There is no liability in such a case until the bill is presented, — not even on the part of the drawer. Presentment for payment at the proper time and place is, however, in all cases absolutely necessary in order that the holder may preserve his remedy against the drawer and indorsers.

B. To whom Presentment for Payment should be Made. — It is not necessary that the holder present the instrument and demand payment of the acceptor or maker personally. It is sufficient if it is presented at his place of business, to a clerk or other agent, or at his house, to his wife, or whoever may be found there. This is deemed a sufficient presentment, because if the acceptor or maker could not be there himself, he should have left funds with an agent to discharge the obligation. If there are several joint acceptors or makers, who are not partners, presentment must be made to each one separately. If they are partners, presentment to one only is sufficient, for each partner is the agent of all the others. If the maker or acceptor has died prior to the date of the maturity of the instrument, presentment for payment should be made to his executors or administrators. If none have been appointed, it may be made at his late residence or place of business. In any of these cases, if no one to make payment is found at the proper place, this is a sufficient dishonor of the instrument, as it is the duty of the acceptor or maker, or his representatives, to have some one there to pay.

C. Place of Presentment. — If it is stated in the bill or note that it is payable at a particular place, presentment must be made at that place. If you are the holder of a promissory note which reads, "I promise to pay one hundred dollars at the Merchants' Bank of Philadelphia," you would have to present that note at the Merchants' Bank. If you did not, you could not charge the indorser. If, as is generally the case, no place is mentioned in the bill or note, it should be presented at the place of business or at the residence of the principal debtor, *i.e.*, the acceptor of the bill or the maker of the note. This is imperative—the presentment must be at the place of business or the residence; even if made personally at some other place, it is not a good presentment.

A, who was the holder of a promissory note, started to go to the office of B, the maker, to present it for payment. While he was on his way there, he met B on the street and asked him if he intended to pay the note; B replied that he could not. A then did not take the trouble to go to B's office, but immediately sent notice of the dishonor of the instrument to the indorsers. When he attempted to hold them responsible for the payment of the note, they defended on the ground that there had not been a proper presentment to the maker, and the court sustained them in their contention. A should have gone on to the business place of B, and there made a formal presentment, even though he knew B was not going to pay. This may seem to be carrying a technicality too far, but you must remember that drawers and indorsers are only sureties and not the principal debtors; the law therefore will excuse them whenever it can find a reasonable opportunity for doing so.

D. Time of Presentment.— In order to subject the drawer and indorsers to liability, the paper must be presented on the day it falls due. If the presentment be made either before or after, and not on that day, they are discharged from all liability. In countries where days of grace are allowed, the presentment should be on the last day of grace. The number of days of grace allowed varies in different countries — from three days usually allowed in the United States and in England, to thirty days allowed in some parts of Italy. In some states in this country days of grace have been abolished by statute. If such is the case, the presentment of course should be made upon the day of maturity.

If the day of maturity, where there are no days of grace, or the last day of grace, where days of grace are allowed, falls on Sunday or any other legal holiday, presentment, according to the common law rule, must be made on the day before. In a number of states statutes provide that in such cases presentment may be on the day after. If the note be one payable on demand, it is not expected that it will be presented for payment at once, else there would be no object in giving it; but it should be presented within a reasonable time. What is a reasonable time is determined by the court upon the circumstances of each case as it arises. Any time longer than the statutory period is always held to be an unreasonable time. If the statute of limitations provides that the right of action arising out of a simple contract shall be barred after six years, the presentment of a demand note six years after its date would certainly be too late to charge the indorser.

If there be some valid reason for delay in presentment, whether the instrument be one payable on

demand or not, it may be excused. If a state of war or a severe storm delays the mails, or if the note is lost, or the holder is too ill to attend to the matter, the presentment may be good, even though it be made after the proper day. With respect to the hour in which the presentment must be made, it is well settled that it must take place during reasonable hours of business. If at a bank, during banking hours; if at the maker's place of business, during business hours; if at his residence, at a reasonable time — certainly between sunrise and sunset.

E. Notice of Dishonor. — If a bill is presented for payment, and payment is refused, it is absolutely necessary that prompt notice of the dishonor be sent to the drawer, and to all the indorsers whom the holder expects to hold responsible. A failure to send due notice will discharge them from all liability. The notice of dishonor consists of a sufficiently accurate description of the bill or note to identify it, a statement that it has been dishonored or unpaid, and the name of the sender. The notice is, of course, sent for the purpose of letting the indorser know that he is to be held responsible. It need not, however, expressly notify him of that fact. The bare notice of dishonor is an intimation that he will be so held.

F. Time of Notice. — If you have presented a bill or note for payment and it has been refused, you should immediately send notice of its dishonor to all the indorsers. This will permit you to charge which of them you choose at a later date. If you fail to notify them, you have lost that right. It is not absolutely necessary, however, to send notice at once. The rule is, if

all the parties live in the same town, and the notice is delivered by hand, it should be sent on the next day. A failure to send it on the day following the day in which the party sending it is in a position to do so, will be negligence, and will discharge all the indorsers. When we say the day following the day in which the sender is in a position to forward the notification, we mean that the holder of the note has one day following dishonor, the indorser whom he notifies has one day following the one upon which he receives notification, etc. If the notification is sent by mail to one in the same town, it should be sent so as to reach its destination on the next day. If the parties do not live in the same town, it is sufficient if the notice of dishonor be sent by the post departing on the day following. If it be a holiday, it is not counted, the day after the holiday taking its place.

The whole theory underlying the doctrine of notice is diligence. The party seeking to charge the indorsers must not fail in any particular to send the notification promptly. If circumstances intervene which excuse the delay and remove the imputation of carelessness, then the failure to send prompt notice may be excused. If the holder does not know the place of residence of the indorser, but uses due diligence and yet fails to find it on time, he is excused for the delay and can charge the indorser nevertheless. Mere inconvenience, however, will not be a sufficient excuse. It has been decided that the illness of the wife of the one whose duty it was to send a notification would not excuse. As to the hour when the notice should be given, very much the same observations may be made as those which were made about the hour of present-

ment. It should be at a reasonable hour—if at a business house, during business hours, etc.

G. Place to which Notice should be Sent. — Just as in the case of presentment, the notice must be sent to the residence or place of business of the one notified. If it is sent by mail, the sender must properly address it. If it be sent to a large city, the street and number must be ascertained and added to the address. One exception to this seems to be made in a case where a man has, in putting his name on a bill, appended the name of the city where he lives. There the indorser is thought to be justified in sending the letter to the exact address as indicated on the bill. If a man receives his mail at several different places, a notice sent to one will be sufficient. The whole theory is that one must be diligent. If he has done all that an ordinarily careful man would do under the circumstances, he is protected.

H. By whom Notice should be Given. — The notice may be sent by any one who is or may be liable to pay the bill or note. Suppose A and B are respective indorsers of a promissory note. C is the holder, and, in case the note is unpaid, may charge B. As B can hold A if he has to pay the note, he is a proper party to send him the notification of the dishonor. If he does so, C may take advantage of that fact and sue A directly if he chooses. The only necessary incident is that A must have been actually informed of the dishonor by a proper person. If notice is sent by an outsider, or by a party to the bill who is not responsible, it is a nullity. If a drawer or maker sends the notice, it will not be good, because those parties are not holders of the instrument, and are in no way concerned with the liability of the indorsers. It is not necessary that the one who is

sending the notice of dishonor should send it personally. He may do it through an agent. It is very common to deposit promissory notes with banks for collection. The bank is the agent of the holder, not only for the purpose of collecting the note, but also for the purpose of notifying the drawers and indorsers. Such a notice is perfectly good.

I. To whom Notice should be Given. — Notice may be sent to the person to be charged, or to his agent. If there be joint indorsers, all should be notified. If the indorsers form a partnership, notice to one is sufficient. If the party sought to be charged is dead, notice should be sent to his executors or administrators (notice to one is sufficient); if there are none appointed, the notice may be directed to the deceased at his late residence or place of business. If the one to be notified is a bankrupt, the notice may be sent to him, or his assignee, at the option of the sender.

J. Manner of serving Notice. — With regard to the manner in which notice must be sent, there are a few general rules. If the parties live or do business in the same town, the notice should be actually delivered by messenger, though this is not imperative. It may be sent by mail, but it should be mailed in time actually to reach the one to whom it is sent on the next day. If, however, the parties live at a distance from each other, and there is a mail service between their respective places of residence, the mail alone is ordinarily used. Service by delivery is always permissible, and is preferable if it can conveniently be made.

6. When the Drawer or Indorser is Liable without the Performance of the Usual Conditions. — We have now briefly discussed the various conditions that must ordinarily be

performed, before a drawer or indorser can be held responsible to perform his obligations. There are some cases, however, where the circumstances are such that this performance of conditions is unnecessary. It sometimes happens that there is a special agreement entered into between the drawer and the acceptor of a bill of exchange, by which it is provided that the drawer shall be the principal debtor. Sometimes, also, it happens that the drawer has failed to deposit funds with the drawee, and consequently the latter refuses to accept the bill. In such cases it is not the drawee, but the drawer, who is really primarily liable. You will remember that the law requires a strict performance of the conditions mentioned before the drawer or indorser can ordinarily be held responsible, for the reason that those parties are usually only sureties for the performance of the obligation of the principal debtors. But if the drawer or indorser is himself the principal debtor, there is no reason for the performance of these conditions, hence they are unnecessary. In the situation we have mentioned, the drawer or indorser can be charged without presentment and without notice.

The same rule holds if the drawer or indorser has waived the performance of the conditions. If, for instance, he has voluntarily agreed that he need not be notified of the dishonor of the bill or note, then the performance of this condition is unnecessary. In the same way, if a man indorses a bill which is a forgery, he is not only responsible to subsequent holders, but he is responsible to them without the performance of any of these formalities. Inasmuch as he has put his name upon a piece of paper which otherwise would be

void, he is really the only debtor and, being primarily liable, is not entitled to notice.

K. Accommodation Paper. — One of the most common instances of a case where the drawer of a bill or the indorser of a note is primarily liable, is in the case of accommodation paper. Suppose you are desirous of raising one thousand dollars, but your credit is not good. You go to X, who is a well-known business man and a friend of yours who has confidence in you, and ask him to make a note for your accommodation. He, if he is thus willing to favor you, makes out a promissory note payable to your order, and signs it as maker. You then indorse the note over to some bank and receive the cash. This is practically a loan of money by X to you, only instead of lending you the money directly, he lends you his credit. Here, as between you and X, you owe the money. While the holder of the note could sue X and recover, because his name is on the paper as maker, yet you are the real debtor. If the note is presented to X at maturity and he refuses to pay, as he naturally would, the understanding being that you would pay, the note is, of course, technically dishonored. The question is, Must the holder present the note and give notice of the dishonor to you, or may he sue you without these formalities? The latter is the rule. You are the real debtor, you are primarily liable, therefore you are not entitled to notice, and presentment and protest are unnecessary. The same thing would be true in a case where a man has accepted a bill for the accommodation of the drawer. The latter is chargeable without notice.

L. Why Notice is Unnecessary when the Drawer or Indorser is primarily Liable. — The reason notice is

required in all the cases above mentioned, is that the drawer or indorser sought to be charged has a remedy against his principal. If the drawer must pay the bill, he may in turn sue the acceptor. In the same way, an indorser may sue a prior indorser or the maker. The object of the notice is to enable him to take prompt measures to secure himself. The maker may be about to abscond. If the indorser is promptly informed of the fact of dishonor, he may take measures to prevent him from doing so. But where the drawer or indorser is himself the principal debtor, he has no remedy against anybody else. Consequently, there is no object in sending notice. That is the reason it is not required when the drawer or indorser is primarily liable.

M. When the Drawer fails to Put the Drawee in Funds.

—If a man draws a bill upon a drawee with whom he has made no arrangements for its acceptance, and in whose hands he has placed no funds, he is, in one sense, guilty of a fraud upon the payee; for even if he drew the bill with the best intentions, he has certainly been guilty of gross carelessness in failing to make the proper arrangements with the drawee.

Suppose you draw a bill on the X bank in London; you have had no dealings with the X bank and have no funds there; the bill is drawn in favor of A, to whom you send it by mail. A presents the bill at the X bank and acceptance is, of course, refused. In such a case you are deemed to be the principal debtor, and may be charged without notice of dishonor. One exception may be made in a case where it appears, from all the circumstances, that the drawer might reasonably expect the drawee to meet the bill, as where the parties

have had a long series of dealings with each other, and the drawee has been accustomed to honor bills drawn on him by the drawer, even if the latter's funds were temporarily low.

N. Where a Special Contract has been Made. — Sometimes a special arrangement is made between the indorser and the acceptor or maker, by which it is arranged that the former shall meet the bill or note when due. Suppose you are the maker of a note, and being about to go abroad for a protracted stay, leave funds in the hands of an indorser to pay it when due. He fails to notify the holder, the note is presented at your place of business at maturity, is protested for non-payment, and the indorser is sued without notice of the dishonor of the instrument. There, again, you see the indorser is the principal debtor. He became so when you put funds in his hands to meet the bill; he is therefore not entitled to notice and may be sued without it.

O. When Notice has been Waived. — If the drawer or indorser excuses the holder from the duty of presentment and notice, he may be charged without the performance of these conditions. This waiver may be either by word of mouth or in writing, if made after the instrument was executed and before it had become due. But if the drawer, when he draws the bill, or the indorser, when he indorses the instrument, agrees to be liable without notice, he is making a contract different from the usual one implied by these acts. As his contract is in writing, he must put his qualification in writing, or it will not bind him. This is true by virtue of the rule that you cannot vary a written contract by oral evidence. If the note falls

due, and a reasonable time for giving notice has elapsed, and yet the indorser promises to pay in spite of the fact, he may be held responsible. This promise seems to be based on no consideration and therefore void; nevertheless, the courts are uniform in deciding that, under such circumstances, it is binding.

CHAPTER VIII

NEGOTIATIONS OF BILLS AND NOTES

1. Manner of Negotiation. — When we speak of negotiable paper, we mean paper that circulates with comparative freedom from hand to hand, not necessarily as freely as money circulates, but, nevertheless, paper which gathers credit as it goes, instead of losing it, as would be the case with an ordinary contract. It is this quality that distinguishes bills and notes from other contracts. This chapter will be devoted to a discussion of the manner and effect of their negotiation or passage from hand to hand. The manner of negotiation we have already discussed. You will remember that in a former chapter we saw that this paper is transferred by means of indorsement. This is the most common method. Some paper can be sold in no other way. Some, however, is so drawn that it may be transferred by delivery alone. This would be the case if a note or bill were made payable to the bearer.

2. Negotiation Prior to Maturity. — From the standpoint of the parties, it is very important whether this negotiation takes place before or after the note or bill falls due. As we shall see later, the man who purchases a bill which should already have been paid, does so at his own peril, for he takes it with the knowledge that there is something wrong about it, otherwise it would

have been paid at maturity. Such paper is called "overdue paper." We shall first discuss the effect of negotiation prior to maturity.

The great principle underlying the whole theory of the negotiability of bills and notes, is the principle that whoever in good faith pays value for such an instrument takes it free from all personal defences. Suppose you buy a horse, fraudulently warranted to be sound, and give in payment your promissory note. You discover the horse to be unsound, return him to the seller, and repudiate your bargain. If the man who sold you the horse sues you on your note, you have a good defence, viz., that the horse was not sound, hence you have not received value for the instrument. But suppose, instead of suing you, he sells your note to A, who is ignorant of the fraudulent warranty, and who gives a good price for the instrument. The fact that you had received no consideration, or that you had been cheated, would not avail you as against A. You would have to pay. A, being what is called an "innocent purchaser for value," takes the paper free from all defences of that nature.

As we have intimated, there are some defences that would be good even as against an innocent purchaser for value—good against anybody. We will first discuss this class, and then we will take up the question as to who is an innocent purchaser for value, in order that we may see against whom the personal defences are available. The fact that the purchaser has not paid the face value of the instrument will be no defence whatever when he is suing the maker. You may have paid only five hundred dollars for a promissory note of one thousand dollars, but you are entitled to recover the

full one thousand dollars. Such a possible contention must be distinguished from the defences which may be successfully urged.

3. Absolute Defences. — All possible defences which may be set up to defeat recovery on a bill or note are divided into two classes, viz., “absolute” defences, which are good against all the world, and “personal” defences, which are good only against those who have actual or constructive notice of their existence. This means generally that they are good against only the immediate parties to the instrument. “Absolute” defences are so called because they attach to the thing itself and travel with it, no matter into whose hand it may come. They are of three kinds, based upon the incapacity of the parties to execute a contract, or upon the circumstance that the contract is illegal and void, or upon the fact that the instrument sued upon has been extinguished in law, and is therefore a nullity. If the defence set up is based upon any one of these three grounds, there can be no recovery, no matter who is suing upon the bill or note, for in each of these three classes of cases the instrument is as so much waste paper, — it has no legal existence. Such a defence does not, however, free the indorsers from their liability to indemnify the successive holders, as we have already learned.

A. When the Maker or Acceptor is Incapable of executing a Contract. — If the maker of a note, or the drawer or acceptor of a bill, is incapable of executing a contract, then, obviously, the paper is of no validity, no matter into whose hands it may happen to come. Such incapacity may exist by reason of the fact that the maker of the instrument is an infant, a lunatic, or

extremely intoxicated. The circumstance that the maker was a married woman constituted a disability at common law; but in England, and nearly all the states in this country, this disability has been removed by statute. We have already seen in our discussion of contracts that if a man is incapable of making a contract, his attempt to do so results in nothing at all, and the same principle naturally holds good for negotiable contracts. An infant or a lunatic has not the power to make a contract, and therefore promissory notes or bills of exchange executed by them have no legal existence.

B. Negotiable Contracts Void if Illegal. — We have learned from our discussion of contracts that mere illegality does not always render a contract void. We learned further that where a statute specifically declares a contract to be void, or expressly forbids its creation, it is void absolutely. It follows that the mere fact that a bill or note is given for an illegal purpose will not render it invalid. As a general rule, illegality is not an absolute defence; it is classed as a personal defence; but if a statute is passed which specifically provides that bills or notes given in payment for certain kinds of debts, or under certain circumstances, shall be void, then such bills or notes can confer no rights whatever upon the persons who have purchased them. In the state of Pennsylvania an act has been passed which provides that promissory notes or bills of exchange given in payment of bets are void. No matter how innocent the purchaser of such a note may be, no matter how much he may have paid for it in good faith, he can recover nothing upon it against the maker.

C. Extinguishment by Cancellation. — We have seen that if the bill or note never had a legal existence, it

can confer no rights upon any persons whatever. If, though it once had a legal existence, it has been extinguished, and in contemplation of law has ceased to exist, we may then apply the same rule. It can no more confer rights after being extinguished than if it had never existed. One of the most common methods by which extinguishment may be brought about is by the cancellation of the instrument. If the holder intentionally destroys it, or cancels it by tearing off his name or drawing his pen across it, this works a legal extinguishment of it, and no rights can thereafter be acquired under it. If the cancellation was done accidentally, although the paper may be no longer in existence, the contract is not extinguished, and, as has already been pointed out, if the holder of a bill or note has accidentally lost or destroyed it, he may recover, even though he is not able to produce it, provided he gives the proper bond of indemnity.

D. Extinguishment by Alteration.—Any intentional material alteration made by the holder, or by his orders, without the consent of the other parties, will vitiate the instrument. By a material alteration is meant any alteration which changes the terms of the bill or note in a way to affect the rights of the parties. Alterations of the date, time of payment, amount of the face of the instrument, rates of interest, the names of any of the parties, *i.e.*, payee, maker, drawer, or acceptor, changing the wording so as to make a non-negotiable instrument negotiable or *vice versa*, changing a joint to a joint and several liability (except in states where all joint makers are by statute to be deemed joint and several), etc., are all material alterations. Innocent alterations by the holder, even though material, will not destroy

the note or bill. He may, providing his act was in perfect good faith, sue upon the instrument as it was originally drawn. Alterations which do not affect the rights of the parties are immaterial, and have no effect whatever. Alterations made by a stranger are considered to be immaterial alterations; they may be disregarded, and the party may recover on the paper as it was originally executed. If an alteration is made with the consent of all the parties, a new contract is made, and the situation is precisely the same as if a new bill of exchange or promissory note had been drawn.

E. Extinguishment by Release or Re-transfer. — The third way in which a bill or note may be extinguished is by means of a release by, or a re-transfer to, the maker or acceptor at, or after, maturity. The most common instance of this is where the holder delivers up the instrument to the acceptor or maker at maturity, on payment of the amount due upon it. When that has been accomplished the paper is legally a nullity, and if through some accident some one else should obtain it and put it again in circulation, the party primarily liable on it could not again be charged. If the acceptor or maker himself buys the note before maturity, it is not thereby extinguished, for he may himself again put it in circulation before it becomes due. But if he keeps it until maturity, then it does, at that time, become extinguished, unless it appears that at the time he purchased it the real title was in some third party. If the person from whom he purchased was not the real owner, payment before maturity will not protect the maker or acceptor, because a payment before maturity is not in the regular course of business. The

holder, therefore, if he is the party liable on the instrument, is not accorded the same protection that would be given to him if he were a third party who purchased in the regular course of business, even though his transferor were not the true owner.

As has been explained, it sometimes happens that parties other than the maker or acceptor are the ones primarily liable on the paper, *e.g.*, the payee and first indorser of a note made for his own accommodation. The question may arise whether a re-transfer of the instrument to such a party will operate as an extinguishment. Some doubt as to this point has been expressed by various writers, but it is now pretty well settled that payment at maturity, by an accommodated drawer or indorser, and a re-transfer of the instrument to him will operate as an extinguishment. But a re-transfer to, and payment by, an ordinary drawer or indorser will not work an extinguishment of the paper. It may be negotiated further, and the drawer or indorser who holds it may sue the acceptor or maker upon it. In order to make the re-transfer it is not necessary that the paper be indorsed. A mere delivery of it to the party primarily liable operates in law as an extinguishment.

4. Personal Defences.—The defences which we have discussed are good against any one, no matter whether he is an innocent purchaser for value or not. We now reach a class of defences which are good only when the party seeking to recover on the note has had actual or constructive notice of the existence of the defence, or when he is one who has given no value for the instrument. That is to say, if the plaintiff is what we call an innocent purchaser for value, none of the defences which

we are now about to take up will be available against him.

We will first investigate the kinds and nature of these "personal" defences, and then we will ascertain exactly what is meant by the phrase "an innocent purchaser for value." What we may denominate personal defences are those which are peculiar to the individuals who make the contract, which do not travel with the thing they affect, like absolute defences, but are good only as between the original parties, or as against others who stand in no better situation.

To revert to an illustration cited earlier in this chapter: Suppose A sells B a horse, warranted to be sound. B gives in payment a promissory note. The horse turns out to be unsound, B returns him to A and repudiates his bargain. A sues him on the note. He cannot recover. Why? Because B has a good defence, viz., that A had made false representations to him about the horse, and thus had obtained the note by fraud. But suppose A sold or negotiated the note to C. Now, you see the defence of fraud is a defence which does not in any way concern the note itself; there is nothing on its face which would lead any one who was about to purchase it, to believe or to suspect that any fraud had been committed. The defence is one not against the note itself, but against a recovery by A personally, by virtue of the fact that he has been guilty of fraudulent conduct.

Whether C can recover or not depends upon two circumstances. First, whether he knew at the time he purchased it of the fraudulent warranty by A; and second, whether he gave value for the instrument. If he did not know of the fraud, and if he did give value,

then he may recover. If either condition fails, he cannot, because, if he either gave no value or knew of the fraud, he stands in no better situation than A. This explains the nature of what are known as personal defences. This is the great advantage which negotiable contracts have over all others. They are not hampered by such defences as these.

F. Fraud and Illegality.—We have already sufficiently explained the nature of fraud: it is always a personal defence. Whenever one party has induced another, by means of false representations, to execute a bill or note, he is guilty of fraud and cannot recover against him. But any subsequent innocent purchaser may do so.

Illegality has also been thoroughly discussed under the subject of contracts. As we intimated when speaking of absolute defences, if an act of legislature provides that a certain class of contracts shall be void, then, of course, no rights are conferred by them. But suppose A rents a house to B to use as a distillery, the intention being to manufacture whiskey without paying the taxes provided for by the internal revenue laws. In payment of rent, B gives A a promissory note. As between A and B, A could not recover, because he has made an illegal bargain; but if A sold the note to a third party, who knew nothing of the purpose for which the note was given, and who paid value for it, this third party might collect its amount.

G. Payment before Maturity.—As already partially explained, payment before maturity is a personal and not an absolute defence. If the note is paid at maturity and is not delivered to the one primarily

liable on it, and is a second time put in circulation, there can be no recovery, for a reason which will be explained when we take up the subject of overdue paper. But payment before maturity is no defence, if the note again be put in circulation and comes into the hands of an innocent purchaser for value, prior to the day on which it falls due. When a maker or acceptor pays a note or bill under such circumstances, — and in fact always, — he should demand and insist upon having the instrument delivered up to him. He cannot be compelled to pay, if it is not so delivered, unless the plaintiff will give a bond of indemnity to save him from all loss.

H. Duress. — In the section of this book relating to the subject of contracts, we discussed the nature of what is known as duress. It is very similar to fraud, and is the same kind of a defence. As against the party who was guilty of the act of duress, it is a perfect defence; as against a party who is an innocent purchaser for value, it is no defence at all.

I. Absence of Consideration. — Absence of consideration is a good defence as between the original parties, and as against any plaintiff who has had notice. If, however, the note is an accommodation note, the one primarily liable may be held by any third party, even though he may have had notice. The reason for the distinction between the case where the note is given intentionally without consideration, *i.e.*, for the accommodation of the payee, and where it is given with the intention of receiving consideration, though none is ever actually received, is as follows. Where the note is an accommodation note, the maker agrees, by the very terms of his contract, to pay to any third party (though not

to the payee) the amount of the note at maturity, without any consideration. This being true, it is thought just that he should be compelled to pay at the instance of any third party, even though that third party may have had notice of the nature of the contract. But if the payee demands the money, the lack of consideration is a good defence.

If the note is not an accommodation note, but no consideration is actually given, the defence is good, as against the payee and all who are not innocent purchasers for value. A gave B a note for one hundred dollars, the understanding between them being that B would allow A one hundred dollars' worth of credit at his store. B refused to allow the credit. After his death his executors sued A on his note. The court refused a recovery. The defence of no consideration was held good.

J. Failure of Consideration. — Failure of consideration differs from lack of consideration. Lack of consideration means that no consideration ever passed between the parties. Failure of consideration means that a consideration was given, but that, for no fault of the maker of the instrument, it has turned out to be of no value. A sells B a lot of ground, in payment for which B gives a promissory note. It turns out that the title which A gave is valueless — the consideration has failed. This is a good defence as against the original party to the contract, or any one not an innocent purchaser for value.

5. Peculiar Rules governing the Transfer of Title of Negotiable Paper. — Having discussed some of the defences known as personal defences, we will try to ascertain against what persons such defences are available. We

have already learned that they are good as against any one not "an innocent purchaser for value." An innocent purchaser for value stands in a peculiar position. As a general rule of law, one who has no title can give none. If you steal my horse and sell him to A, I can go to A and reclaim him, or if A has sold him again, I may force A to pay me his value. Why? Because the horse never ceased to be mine. You get no title by your theft, hence you can give none to A. But the rule is different with property which the law wishes to circulate freely. If you steal my money and use it in paying a debt to A, I cannot reclaim it, because from its nature the title will pass to any one who gives value in exchange. Very nearly the same principles apply, by virtue of "the custom of merchants," to commercial paper. If I lose a note which is transferable by delivery and it is sold for value to you, you become the owner and may sue the maker. You acquire a title because you are an innocent purchaser for value, in spite of the fact that the one who sold to you had no title.

6. An Innocent Purchaser for Value must Purchase in the Regular Course of Business. — We now come to the question, Who is an innocent purchaser for value? The first essential is that he must be a purchaser in the regular course of business. If the paper is transferable by delivery alone, then delivery is sufficient. If not transferable by delivery, it must have been properly indorsed by one who was the legal owner at that time. The greater number of cases where a purchaser for value, without notice, gets a title good against some one else equally entitled to it, are cases where the paper is transferable by delivery. In all other cases

but little, if any, opportunity arises for such a result. If the indorsement is made by one incapable of making it, the purchaser gets no title at all, *e.g.*, if the indorsement be made by a lunatic or an unauthorized agent. If it is a forgery the indorsee gets no title. All steps in the transfer must be regular before the transferee becomes a purchaser at all.

7. Purchaser must have Given Value. — The second essential element of an innocent purchaser for value is that he shall give value for the instrument. This does not mean that he must pay in money, or its equivalent, the actual value of the instrument, but that he must have parted with something of value in exchange for it. You remember when we were discussing contracts, we dwelt for some time on the nature of consideration, and we saw that consideration consists of any benefit at all to the one party or any detriment to the other — and by benefit and detriment we meant such as might be measured or expressed in money value.

About the same principles may be applied to ascertain what is meant by value in this connection. If one gives money or other negotiable securities, or enters into liabilities of any kind, in consideration of the sale of negotiable paper to him, he pays value for it. If he agrees to refrain from suing a person against whom he has a cause of action, or does any act tending to prejudice his own interest, he gives value.

In cases where a promissory note, or bill of exchange, is transferred in cancellation of a preëxisting debt, there is a conflict of authority. One view is that the payment of a debt by a note or bill does not actually extinguish the debt, but only suspends it until such time as it may be ascertained whether the bill or note is

paid at maturity, when, if it is not, the original debt will revive; and that, such being the case, the creditor has suffered no detriment and therefore has given no consideration. The other view is, that whether the bill or note taken in payment of a preëxisting debt is paid or not, the purchaser has either extinguished his debt altogether or has delayed prosecuting his remedy, and in either case he has given value. The latter seems to be the sounder view. If paper is given as collateral security for the payment of a preëxisting debt, the transferee is not a purchaser for value.

8. Purchaser must be Innocent. — Finally we ask, What do we mean by an “innocent” purchaser? By this we mean a purchaser who has no notice of any personal defences which might be interposed by the party liable on the paper. This notice may be actual knowledge, or what is known as “constructive” notice. Of course, if the purchaser actually knows or is informed that such a defence as fraud or duress is liable to be set up, he is not “innocent.” It sometimes happens, however, that the purchaser does not actually know of these defences, but shuts his eyes to facts which he might have discovered by means of a little investigation. If he knows such facts as ought to put him on inquiry as to the character of the paper with which he is dealing, but at the same time studiously refrains from making such an investigation as any ordinarily careful man would make, he may be charged with actual notice of the facts which, if he had used reasonable diligence, he might have discovered. When we say “charged with notice,” we mean that he is presumed to have had actual notice, and will be treated as if he had had it. The purchaser is charged with “constructive” notice of all defences which could

be ascertained, or which would naturally be surmised from a perusal of the face of the instrument. Thus, a purchaser is charged with notice of the character of the indorsement, if the bill or note has been altered or mutilated in any way, or if there are unfilled blanks in it, etc.

9. Overdue Paper. — This concludes our discussion of the negotiation of paper prior to maturity. We now take up the question of the effect of the negotiation of overdue or dishonored paper. It is obvious that if a man purchases paper which has already been dishonored, he is not an innocent purchaser. He is charged with constructive notice of the date of the bill, and therefore is presumed to know that it is overdue. Overdue paper may be transferred, but, with one exception, the transferee takes it subject to all defences that could have been urged against his transferor. Where the defendant, maker, or acceptor has a debt owing to him by the plaintiff's transferor, which he could have set off in an action by the transferor, that gives him no right to set off the debt in an action by the transferee. Aside from this one consideration, the purchaser buys at his own risk.

Now, a word as to what is meant by overdue paper. If the note is payable at a particular time, it is overdue after the day of maturity. In countries where days of grace are allowed, the paper is not overdue until after the last day of grace has expired. Paper payable at no fixed time, but on demand, is overdue after demand, or, without demand, after the expiration of a reasonable time.

CHAPTER IX

CONFLICT OF LAWS

A. How Rules conflict in Different States. — In connection with the subject of bills and notes, and the rules which govern their negotiability, etc., it will be almost necessary to deal, at least briefly, with what is known as conflict of laws. It may happen that a bill of exchange is drawn in New York upon a man living in Pennsylvania, directing him to pay a sum of money to a third party, who lives in Delaware. The payee may negotiate the instrument in Maryland, and the parties, when they fall into a dispute about it, may live in New Jersey. The laws of New York, New Jersey, Pennsylvania, Maryland, and Delaware may not be uniform on all questions coming up for decision, and the query naturally arises, What law is to govern? The law of one state will govern some questions and the law of other states, others — it depends on the precise nature of the point in dispute. In order that we may deal intelligently with such a case as the one we have indicated, it will be necessary for us to have some knowledge as to the law governing each question.

B. Summary of Rules. — We will here append a brief summary as to which law governs each particular question that may come up for dispute. The law of the place where the contract is made, which in our illustration

is New York, governs all questions relating to the making of the contract. Whether the instrument is negotiable or not, and whether it is properly drawn up, are questions to be determined by New York law. The law of the state where the contract is to be performed, which in our illustration is Pennsylvania, governs the liability of the maker of a note or the acceptor of a bill. The law of that state also determines whether days of grace are allowed, and whether or not it is necessary to protest the bill for dishonor. The law of the state where the bill or note is indorsed, Maryland, governs the question as to whether the title has passed to the present holder. All questions relating to the transfer of the instrument are determined by the law of that state. Lastly, the law of the state where the action is brought, New Jersey, governs all questions concerning the admissibility of evidence, and all questions concerning the statutes of limitations, or any other statutory laws bearing upon the liabilities of the parties.

CHAPTER X

CHECKS

1. A Check is a Bill of Exchange. — A check is a species of negotiable paper, differing slightly from both a bill of exchange and a promissory note. It is really a bill of exchange of a peculiar kind. It differs from the ordinary bill in that it must be drawn on a bank, it is payable on demand, and no acceptance is required.

2. Liability of the Drawer. — The drawer of the check is liable for its payment, and no delay or failure to notify him will excuse him, except in so far as he has actually been damaged by the delay. Suppose you pay by check a debt which you owe to me. I am careless, and fail to demand payment within a reasonable time. Meanwhile the bank fails. I cannot charge you for the amount. I have lost it through my own carelessness and must suffer the consequences. But the mere fact that the payee of a check delays in presenting it until perhaps the drawer has withdrawn his funds, will not relieve the latter from liability. In order, however, to protect yourself from any possibility of loss, you should deposit a check as soon as you get it.

3. Liability of the Drawee. — The drawee, the bank upon which the check is drawn, is not liable at all to

the payee for its payment. The drawee of an ordinary bill is not liable until he has accepted, and, as has been said, the drawee of a check does not accept at all. The check is an order to the drawee, directing him to pay a certain amount to the holder of the check, using for that purpose funds belonging to the drawer; the latter, by his action in drawing the check, merely designates the bank as his agent to pay a certain sum to the payee. If the bank refuses to pay at a time when it has funds of the drawer for that purpose, and thus hurts his credit, it may render itself liable in an action of tort for the injury which it has done to him. But the payee has no right whatever to sue it for its failure to pay him; the payment of the check is a matter which lies solely between the drawer and the payee.

4. Certified Checks. — If, however, the holder of a check takes it to a bank and has it certified, he then has a valid claim against the latter. When a bank certifies a check, the proper officer, president or cashier, indorses it "Good," with his signature or stamp. This is equivalent to accepting it. At the time when a bank certifies a check, it sets aside sufficient funds belonging to the drawer to pay the amount mentioned therein. These funds then become the property of the holder of the certified check, and from that time he has a perfect cause of action against the bank. If at any subsequent time it refuses to pay his check on demand, he may sue and recover the full amount. The liability of the drawer ceases from the moment the check has been certified.

5. Liability of Indorser. — If the check is indorsed to a third party by the payee, as it may be in the usual manner, the indorser guarantees the payment of the

check in the same way that the indorser of a bill or note guarantees its payment, and his liability is substantially similar. If he wishes to pass the title without subjecting himself to liability, he may indorse "without recourse." In such cases the effect of his indorsement is simply to pass title, — he himself is not in any way responsible for the payment of the check.

PART V

CONTRACTS OF COMMON CARRIERS

SECTION I

CARRIERS OF GOODS

CHAPTER I

ESSENTIAL CHARACTERISTICS OF COMMON CARRIERS

1. **Nature of a Public Calling.** — The contracts which have been discussed thus far concern only those persons who are directly parties to them. Such contracts may be called private contracts, as distinguished from those in which the public has an interest. It may seem strange that the public could be concerned in a contract between one man and another, but there are some kinds of contracts which, by their nature, do concern the public at large. If an individual, or a collection of individuals, exercises what is known as a public calling, if they offer to serve the public, the contracts which they make with the public, and the manner in which they exercise their obligations, must be, to a greater or less extent, controlled by law. An inn-

keeper is one who exercises a public calling. He offers to house and feed any member of the public for a stipulated price. His obligations toward his guests are always regulated by law, and he is bound to receive all proper persons who apply to him. The public is sufficiently interested in the contracts which he makes to stipulate that any one of their number who comes to him with the proper price, and at the proper time, shall be accommodated.

2. A Common Carrier exercises a Public Calling. — One of the most common examples of one who is engaged in a public calling is the common carrier. A man, or a corporation, carrying goods or passengers from place to place for a compensation, exercises a calling distinctively public. His business is to serve the public, his profit is derived from the public, and the public in general holds him accountable for his actions toward those of their number who have entered into contracts with him. The subject of common carriers therefore presents a new situation. We must first ascertain what are the rights and liabilities of this person whose business it is to serve the public, before we are able to interpret his contracts.

3. Definition of "Common Carrier." — A common carrier is "one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place." One essential characteristic of the common carrier is that he offers himself to the public generally as a carrier of goods — that he stands ready to transport the merchandise of any proper person who applies to him and agrees to pay him his price. Another essential characteristic is that the carrying of goods must be for a consideration. One who enters into a special

contract to carry your goods from one place to another, does not thereby render himself a common carrier, nor does a man who carries the goods of every one free of charge. The two essentials must be present to establish this peculiar character.

4. Distinction between Private Carrier and Common Carrier. — It is often very difficult to tell whether a carrier has become a common carrier or whether he is an ordinary private carrier. A, a farmer, was accustomed to draw his produce to a country town several miles away from his home. On his return trip he often carried parcels from the town to his neighbors, from whom he received a consideration. He was always willing to perform this service when requested. Having lost some of the goods which he was carrying, the question arose whether he could be held responsible as a common carrier. Ordinarily he could not, because he did not hold himself out to the public as a carrier of goods. This was not his business, it being merely incidental to his journey to town that he carried parcels for his neighbors. It is very important to know whether a carrier is a common or private carrier, because his responsibility, if he has lost some of the goods which he was carrying, is very different in these two cases. As we shall learn later, a private carrier is not held so strictly to account for the safety of the goods as is the common carrier.

5. Common Carrier need not Make an Unlimited Offer. — When we say that to be a common carrier one must hold himself out to the world generally as a carrier of goods, — we are now speaking of carriers of goods only, not carriers of passengers, — we do not mean that he must hold himself out as a carrier of all kinds of goods,

or as a carrier to all places. A man may engage in the business of carrying wheat from Philadelphia to New York, and be a common carrier. He would not be compelled to carry anything but wheat, nor between any points except Philadelphia and New York; and yet between those two places he is just as much a common carrier as though he stood ready to carry anything anywhere.

Perhaps the main test as to whether a man is a common carrier is whether his carrying is habitual or merely occasional. If it is habitual, the inference is that he holds himself out to the public as a common carrier; if it is only occasional, the inference is the other way. Some of the more frequent instances of common carriers are railroad companies, steamboat companies, and express companies. Any person or corporation making a business of carrying goods in the same manner as those we have mentioned, is a common carrier. A tug-boat is not a common carrier, for it does nothing except tow other vessels; nor is a railroad company a common carrier when it merely hauls a train belonging to another company. In order to be held to the responsibility of the common carrier in a particular case, the carrier must have entire control over the goods which he is transporting. The fact that he does have such complete control over the goods explains, in a large measure, his strict accountability.

CHAPTER II

DUTIES OF COMMON CARRIER TOWARD THE PUBLIC

1. Duty to Carry for All who Apply. — The common carrier makes his living entirely out of the patronage of the public, and in return the law holds him to certain duties toward the public. The first of these is the duty to accept and transport all goods which are offered to him, provided the goods are those which he is accustomed to carry, provided they are in proper condition for transportation, and, lastly, provided he is paid the price of their carriage. If, when all these provisions have been complied with, the carrier refuses to transport the goods which are offered to him, he may be punished by being compelled to pay heavy damages to the person who has been refused.

It should be noted, however, that when the goods tendered are not of the kind which the carrier holds himself out as being ready to transport, he is not compelled to accept them. An express company is not compelled to carry dogs. The proprietor of a line of stage-coaches will not be compelled to carry a box of dynamite. A railroad company could not be compelled to accept goods which are improperly packed, or delivered to them in such condition that they would be damaged before the end of the journey, and thus subject the company to the liability of being sued for damages.

Moreover, the carrier is not liable for his refusal to carry goods if, through no negligence of his own, he has not the facilities for doing so. It frequently happens, in case of a sudden rise in the price of wheat, that many thousands of carloads will be offered for shipment to a railroad at the same time. If the company refuses to accept a portion of the wheat because it has not cars enough to carry it, no action will lie, on account of such refusal. In some states, if the company has been negligent in not providing sufficient cars, or rather in not providing as many cars as would naturally be expected to be needed at that time, it is held responsible. This, however, is not the rule everywhere.

2. Duty not to Discriminate. — Common carriers are also under an absolute duty to treat in the same manner all persons who become their customers. They cannot make unjust discriminations between parties who offer goods for transportation. They are at liberty to charge lower rates for larger contracts, but they are not at liberty to discriminate between individuals merely because of the personality of him who tenders the goods, or on account of the particular class of goods which is offered. If the carrier does make such discrimination, the injured party may apply to the courts for redress.

Some states have gone so far as to pass laws prohibiting the railroad companies from charging different proportionate rates for "long hauls" and for "short hauls." These laws, however, have been held to be unconstitutional, and therefore void, because they interfere with the legitimate business of the railroad. The courts have decided that it is entirely just for the road to charge a lower proportionate price for a long haul than for a short haul.

One of the most bitter fights over this question was precipitated when the railroad companies attempted to discriminate against oil merchants who were not allied with the Standard Oil Company. Owing perhaps to some arrangement between this great corporation and the railroads, and very probably because a large amount of the stock of the railroads was owned by the corporation, higher rates were asked for oil offered for shipment by small companies than were charged for that offered by the Standard Oil Company. In some cases the railroads refused to ship the oil at all, alleging that they had not sufficient cars, or that no siding could be put in at the points of shipment or delivery, and other excuses more or less insincere. The courts decided in favor of the smaller oil producers, but the decision helped them very little, as there are a number of ways in which railroads can discriminate without really transgressing the law. One of the most common ways is a general regulation that no oil shall be carried except in cars belonging to the shipper. A huge corporation like the Standard Oil Company could afford to own its own cars, while smaller companies could not possibly do so. These rules, while not technically a discrimination, really operate very much to the injury of the smaller companies.

3. Duty to charge Reasonable Prices. — Railroad companies, in fact common carriers of all kinds, are also under a duty to the public not to charge exorbitant prices. It may seem as if it were an unwarrantable interference for the law to step in and dictate what prices they should charge, but when the public at large is interested and the public welfare is directly at stake, the law does have the power to make such regulations. Laws

have been passed in many of the states of the Union, which fix a maximum charge for the carriage of freight upon the railroads within the limits of the state. If the law fixes the rate at an amount so low as to render the business of the railroad unprofitable, it will be declared unconstitutional because it destroys the business of the corporation; but as long as the maximum price named in the statute is, in the opinion of the courts, a reasonable price, the railroads are compelled to conform to it. In a similar manner, the rates of fare for cabs and street cars have been regulated in many cities. In some parts of the West the rates of storage to be charged by the owners of warehouses for storing grain are also fixed by law.

In some parts of the country railroad commissions are appointed, who have general oversight of the business of transportation in the state. They see that reasonable prices are charged, reasonable regulations made, proper facilities offered, etc. This, perhaps, leads us to doubt whether we are not drifting too far in the direction of "paternalism," — a general term used to designate the policy of a government which closely regulates the business carried on within its borders. In many countries of Europe the governments own, and entirely control, the conduct of railways and similar quasi-public corporations.

CHAPTER III

LIABILITY OF COMMON CARRIER

1. When Liability Attaches.—The responsibility which attaches to the carriage of goods by a common carrier is much greater than that which attaches to the carriage of goods by one who is a private carrier. We first ask, When do these responsibilities as a common carrier begin? The liability of the common carrier begins as soon as the goods are delivered into his possession and accepted by him for transportation. The only point of difficulty which can arise in this connection is to determine when the goods have been accepted. Sometimes this question is involved in more or less doubt.

A took a box of goods to a railway station, intending to send it by the next train. Finding no one at the station, he put the box on the platform, and went away, leaving it there. It was removed and lost, and the question arose whether or not the company had accepted the box for transportation. That would depend upon custom: if it was usual for boxes to be left at that place, and the company was accustomed to accept them in that manner, it might be held responsible as a common carrier; otherwise, it would not. If goods are left at the warehouse of the railroad company, with the understanding that they are not to be shipped for some days, the company is not a common carrier as to

those goods until the time for shipment arrives. Until then he is simply the custodian of the goods, and as such is under a lesser liability, which is known as the liability of the "warehouseman."

2. Common Carrier an Insurer of the Goods. — We may now inquire, What is the responsibility of the common carrier, presuming that it has been incurred? Suppose you deliver goods to a railroad company to carry from Chicago to New York. The goods do not arrive at New York, but are lost, no one knows where or how: Can you charge the company with the loss, or must you first prove that it was due to some fault on the part of its officers? The latter is unnecessary. By the contract of carriage, common carriers absolutely agree that they will carry goods safely from the place where they are delivered to them to their destination. If they fail to do so, they are responsible for the value of the articles, no matter how they may have been lost, subject to one or two exceptions, which we will take up hereafter. The point here insisted upon is, that it is not necessary that the carrier be shown to be negligent. He is said to be an insurer of the safety of the goods, and is absolutely responsible. This responsibility attaches to common carriers by a rule of law, and they cannot relieve themselves from it without an express contract to that effect.

3. Act of God. — There are, however, some few exceptions to the general rule that a carrier is absolutely responsible for the safety of the goods which he carries. One of these instances is where the loss is incurred by an "act of God." The phrase "act of God" is used to indicate the agency of some superior power, which could not have been controlled by any means whatever.

Suppose an earthquake destroys a railroad train with the goods which are upon it, or a landslide buries it under its débris, or a tremendous storm causes a vessel to sink, — all these are “acts of God,” because they are forces beyond the control of man.

If, however, a vessel runs upon a hidden rock, situated so that the accident was one impossible to be avoided, that disaster would not be deemed to have been caused by an “act of God.” The distinction between this case and the previous ones is not altogether obvious at first sight, but there is a distinction. In the one case the accident was caused directly by the superior agency. In the other, while the rock was no doubt placed at that point in the sea by an agency entirely superior to man, yet the vessel ran upon it, not by reason of any supernatural agency, but by the act of those who were steering it. Such a disaster is known as an inevitable accident, that is, an accident which could not have been averted; but it does not excuse the common carrier from his responsibilities. It is said by some writers that if such an accident occurs in an uncharted sea, the disaster would be deemed to have been caused by the act of God, but otherwise, if the rock should have been marked on the map. This distinction is shadowy and illogical. It is preferable to class such a case as an inevitable accident.

4. Where the Carrier has also Been at Fault. — Even though the goods may have been destroyed by an “act of God,” if their destruction was brought about in part through the negligence or unreasonable delay of the carrier, he is held responsible notwithstanding the exception. If, by reason of his carelessness, the carrier has

unreasonably delayed his voyage so that he is overcome by a great storm, which he would have entirely escaped had he been on time, he would probably not be excused, even though his vessel was wrecked by the fierceness of the tempest alone. In the same way, if the captain of a vessel, instead of following the usual course marked on the chart, makes a deviation into an unknown sea and there meets with a loss on account of an "act of God," the carrier is responsible, because the real cause of the accident was the deviation from the course.

5. Act of the Public Enemy. — Another exception is where the goods have been destroyed by an act of the public enemy. If the destruction of the property has been caused by an act of a hostile army invading the country, the loss falls upon the owner of the goods, and the carrier is not responsible. During the Civil War train-loads of goods passing from one point to another were frequently intercepted and destroyed by the armies of both sides. In such cases the carrier is not responsible. In the same way, if mobs destroy property in the hands of the carrier, he is as fully excused as if the loss had been incurred by an "act of God."

6. Where the Shipper assumes the Responsibility. — Sometimes the owner of the goods does not surrender them into the entire custody of the carrier. He may think he knows more about how to ship them than the officials of the railroad, and perhaps goes with the goods in order to see that they shall not be damaged. In such a case, if they are lost without any negligence on the part of the officials of the railroad, the latter is not responsible. A man who wished to ship a wagon upon a freight car insisted upon putting it on the car himself, and, as he thought, braced the wheels in such a way

that it would not roll off. The wagon, however, did roll off in the course of transportation, and was destroyed. The shipper tried to hold the company responsible for its value; but the court said, inasmuch as he himself had taken charge of the loading of the vehicle, and it was lost because of the defective bracing of the wheels, he would have to stand the loss himself.

7. When Goods are destroyed on Account of their own Inherent Nature. — It would be most unjust to hold the common carrier responsible for the loss of goods which are shipped in such a manner that they cannot possibly reach their destination in safety. Assume a case where fruit is shipped for a long distance, having been improperly packed, and being on the point of decaying when it starts. Suppose that the railroad officials are not notified as to the character of the contents of the box, and it is shipped in an ordinary freight car. Of course, in such a case it is not possible that the fruit can reach its destination in good condition.

Whenever a loss thus occurs by reason of the inherent nature of the goods themselves, and without any negligence whatever on the part of the carrier, the latter is not responsible. The same rule applies when cattle are shipped alive, and injure each other by quarreling among themselves. When animals are so shipped, being placed under unusual circumstances and in strange surroundings, they will almost inevitably fight with each other during the course of the journey. If, on account of this, some of them are killed or injured, the carrier is not responsible. So much risk is assumed by the shipper.

8. Other Excuses for Non-delivery of Goods. — We have seen that if goods have been lost through an "act of

God," or an act of the public enemy, or on account of their inherent nature, the carrier is not responsible for his failure to deliver them to the consignee. There are one or two other instances in which the common carrier is also excused from fulfilling his contract. Suppose A steals a quantity of goods from X and ships them to B, the common carrier making a contract with A that he will deliver them safely to the consignee. If, before the goods are finally delivered into the possession of B, X appears and claims them by virtue of his superior title, the common carrier cannot refuse to deliver the goods to him without subjecting himself to liability for their conversion. The carrier, therefore, is compelled to deliver them to X, and, consequently, is unable to deliver them to the consignee. In such a case he is excused for his failure to perform his contract.

Another case in which the carrier is excused, is where the consignor has stopped the goods *in transitu*. You will remember from our discussion of this subject under the head of sales, that when the consignee has become insolvent, the consignor has the privilege of stopping the goods at any time before they reach the end of the journey. If he exercises his right, the carrier is excused from delivering to the consignee. Lastly, if the goods, while in course of transportation, have been seized by an officer under legal process, this excuses the carrier from the duty to deliver.

9. Liability for Delay; Negligence. — Common carriers are not absolutely bound to deliver goods, shipped through their agency, at the exact time at which they agree to do so. It is recognized by the courts that for trains to be always on time is an utter impossibility.

A delay, therefore, which is not due to any fault or negligence on the part of the common carrier does not subject him to liability; though if it has been caused by his own negligence, he is responsible. If he makes a special contract, by which he absolutely binds himself to deliver the goods at a certain specified time, then he is bound to deliver them at that time.

Thus far we have been discussing the peculiar liability attached to the common carrier by virtue of his calling. Before closing the discussion of his liability, it should be remarked that he is always responsible for his own negligence, as was indicated when we were discussing the "act of God," the "act of the public enemy," etc. If in such cases the carrier has been negligent, he is still responsible.

10. Contracts limiting Liability. — It is customary, in fact it is almost universal, for railroads and other common carriers to make special contracts with persons who ship goods through their agency. By these contracts they provide that they shall not be responsible beyond a certain sum, unless the value of the goods be declared beforehand; or that they shall not be liable at all, unless a claim is presented within a certain time or in a particular manner; and sometimes they attempt to make a contract by which they shall not be liable under any circumstances whatever. You can see at a glance that if all carriers insisted upon always making such contracts as would absolutely free them from liability, the public would be forced to accept the situation, because goods must be shipped. The result would be that no common carrier would ever be responsible for goods which he lost. This would defeat the purpose of the common law rules fixing the liability of persons exercis-

ing this public calling. Consequently, the law has stepped in and has forbidden carriers to make contracts of certain kinds. Every one is aware that express companies always make contracts providing that they shall not be responsible beyond fifty dollars for goods which are shipped by them, unless the value of the goods is declared beforehand. Such contracts the law will sanction. They will also allow the carrier to make a contract providing that a claim for damages must be presented in a certain manner and within a reasonable time.

But the common carrier cannot make a contract by which its liability for the negligence of its servants is evaded. Unfortunately, there is one state which has so far departed from the just and equitable view of the common law as to hold that a carrier may stipulate against any liability for the negligence of its servants. This state, which stands alone in this view of the law, is New York. In other states, if an agreement is entered into by which the shipper provides that he will not hold the carrier responsible for accidents occurring through the negligence of its servants, this contract is void. In some states, any contracts in any way limiting the liability of the carrier are void.

11. When the Liability Terminates.— Having seen what the responsibility of the common carrier is while he is carrying the goods, we next ask, When does this liability come to an end? The short answer to this question is, It comes to an end when the goods are delivered to the consignee. The question which is sometimes difficult to answer is, When are they delivered? If they are personally delivered to the consignee, then, undoubtedly, the liability of the carrier is at an end.

Suppose the goods arrive safely at the termination of the railroad journey, and a notice is sent to the consignee that the goods are there, subject to his order. If the notice is properly sent, and the consignee does not come to claim the goods within a reasonable time, the liability of the company is at an end, and it is therefore responsible only for its negligence. Its liability is the same as that which has been referred to as that of a "warehouseman," that is, the liability which the owner of a warehouse would be under for goods delivered to him for safe keeping. In such cases the carrier is responsible for the manner in which he keeps the goods, but he is not responsible absolutely for their safe delivery.

Sometimes, when goods are to be shipped over several different lines, the first carrier delivers them to a second carrier, the second carrier to a third, and so on, until they reach the end of the journey. In that case, when one carrier has delivered the goods to the next connecting carrier, his responsibility ceases and that of the next carrier begins. There are, however, a few states in which the first carrier is responsible, (unless there is a special contract freeing him from responsibility), even after he delivers the goods to the next carrier and until they are finally delivered to the consignee.

CHAPTER IV

RIGHTS OF THE COMMON CARRIER

1. **Right of Compensation.** — Having seen what are the duties and liabilities of the common carrier, we now ask what rights he has to compensate him for all these arduous obligations. The first right is that of compensation for the services which he renders in carrying goods. It goes without saying that no common carrier will be forced to carry goods without being paid for it. He is entitled to a reasonable compensation, and he is not obliged to carry goods unless this compensation is given to him before he accepts them for transportation. As a general thing, common carriers do accept goods without payment in advance, but they are not required to do so. With regard to the amount of compensation, we have already seen that the common carrier cannot charge unreasonable rates; on the other hand, it is also true that no law can be passed which unreasonably lowers the price which the common carrier may charge; and he is permitted to charge proportionately higher rates for short hauls than he does for long hauls. An act of Congress may regulate the rates to be charged for through freight which passes from one state to another, but no state statute can in any way regulate rates except those which are charged from one point in the state to another point in

the same state. This is true because the Constitution of the United States prohibits the states from interfering with interstate commerce.

2. Right of Lien. — Practically, the only extraordinary remedy or privilege which the common carrier has, as compensation for his obligations, is the right of "lien." By this it is meant that if the common carrier is not paid in advance for the carriage of the goods, he may retain them in his own possession until he is paid. This privilege attaches to any kind of goods which he carries. It is really given to him in order to compensate him for the rule that compels him to accept goods from all who tender them. If he were not permitted this remedy, he would be at the mercy of persons whose goods he had accepted and who did not intend to pay him, and against whom he would perhaps have no other redress. As soon as the carrier has delivered the goods, however, he has lost his lien, and has not thereafter any right over them. According to the rules of the common law, a carrier has no right to sell goods which he thus retains to pay him for the transportation charges; but in nearly all the states in this country statutes have been passed which give him the right to sell after a reasonable time has elapsed.

SECTION II

CARRIERS OF PASSENGERS

CHAPTER I

DUTIES TOWARD THE PUBLIC

1. Who are Common Carriers of Passengers. — We have now discussed carriers of goods, their rights and liabilities. A second class of common carriers are those who carry passengers. The common carrier of passengers holds himself out to the public as one who will carry all proper persons who pay the stipulated fare, between the places for which he has facilities for carriage. Very much the same tests which we applied to ascertain when a carrier of goods was a common carrier, may be applied to ascertain when a carrier of passengers is a common carrier. If he is one who makes a business of transporting human beings, and holds himself out to the public as one who is engaged in such business, he is a common carrier. Omnibus lines, street-car companies, stage-coach companies, railroad companies, ferryboat companies, etc., are common carriers of passengers. As in the case of carriers of goods, the carrier of passengers must be one who carries for hire.

2. Who are Passengers. — All persons who ride upon the vehicle of the common carrier, with his consent,

are passengers, with the exception of those who are employed by him, and are there not in the capacity of passengers, but as workmen. While it is true that in order to be a common carrier of passengers one must be a carrier for hire, yet a man may be a passenger, although he has paid no money for transportation. A man who travels upon a pass, or is the guest of a railroad official, is a passenger. A trespasser, however, is not,—such as one who steals a ride upon a train, and is there without the consent, either expressed or implied, of the railroad company. If a man attempts to ride upon a train by using a ticket which he has no right to use, he is not a passenger, and is practically in the same situation as a trespasser. An individual becomes a passenger as soon as he is accepted by the carrier for transportation. This is usually at the moment when he boards the vehicle. It is sometimes held, also, that one who is in the station of the carrier intending to board an incoming train is a passenger, even though he has as yet not stepped into the vehicle.

3. To Accept all Proper Persons who Apply.—Just as the carrier of goods is bound to accept all proper goods which are tendered him for transportation, so the common carrier of passengers is bound to accept as passengers all proper persons who present themselves for carriage. When we say proper persons, we mean to exclude those who travel for the purpose of injuring the railroad, persons who are fleeing from justice, or persons who are traveling for any improper purpose whatever. If a man is so intoxicated that his presence would be obnoxious to the other passengers, he may be refused. It should be remembered, also, that the carrier offers transportation facilities only for the purpose

of carrying people from place to place; he is not, therefore, obliged to accept any one who travels for the purpose of carrying on business while on the train. If a man intends to sell papers or black boots, or carry on any kind of business while on the train or boat, the carrier is not obliged to accept him as a passenger.

4. Duty not to Discriminate. — The common carrier of passengers cannot make any improper discriminations in the facilities which he offers to those who apply. He may, however, make reasonable regulations. He may set apart a car or compartment exclusively for the use of women, and enforce such a regulation. He may offer better facilities to people who pay more money and who are going longer distances, or who have different kinds of tickets, but he may not capriciously discriminate between people on account of their race or color. In some states it is contrary to law to make negroes go into a car by themselves; in other states this is considered a reasonable regulation, particularly if the car set apart for negroes is as comfortable as the one set apart for white people. Such a regulation is considered reasonable in most of the Southern states, where negroes are much more numerous than in the North.

CHAPTER II

LIABILITY OF THE CARRIER OF PASSENGERS

1. **Carrier of Passengers not an Insurer.** — The common carrier of passengers is not an insurer of the safety of the persons whom he transports from place to place. We have seen that if a common carrier accepts goods, and makes a contract to carry them safely from one point to another, he is absolutely responsible for the safe delivery of the goods. But if the carrier accepts you as a passenger, and agrees to transport you safely from Chicago to New York, he does not thereby absolutely guarantee to set you down safely at New York. What he does agree is, that he will use all possible care to transport you safely, and that if he fails to use all possible care, then he will be responsible. In other words, if a common carrier has injured you while you are traveling as a passenger, it must appear that he has failed, in some small particular, at least, to exercise due care in preserving you from danger, or else you cannot hold him responsible. Suppose a freshet has washed out a bridge, and the train which you are on falls into a gully, and you are severely injured. If it appears that the train men could not have guarded against the accident by any possible precaution, then you cannot recover for your injuries. If it appears, however, that they should have ascertained the injury to the track, and ought to have guarded against the accident to the train, and could have done so, you can recover.

Not only may you not recover if it has been proven that the company was not negligent, but you may not recover if you yourself have been negligent. If you attempt to board a moving train, no matter how careless the train men may have been, you cannot recover, for you have been injured while doing something which you should not have done: by your own negligence you have contributed to the accident.

If the carrier has failed to deliver you at your destination at the time agreed upon, he may be responsible for any reasonable loss which you may have sustained, provided the delay was due to some negligence on his part. The officers are not absolutely bound, however, to conform in every particular to the time scheduled, for this is recognized to be an impossibility.

As we shall see more fully when we discuss the subject of agency, the common carrier is also responsible for injuries received by the passengers through the wrongful acts of its servants. Suppose the conductor of a train wrongfully puts you off, and you are consequently injured or suffer some loss, you may recover against the company, provided the act of the conductor was done while he was acting within the scope of his authority.

2. Contracts limiting Liability. — The common carrier of passengers is not allowed to make a contract by which he provides that he shall not be responsible for his own negligence. Such contracts are absolutely void. In some states it is provided that a contract may be made by which a carrier shall not be responsible for his negligence resulting in injury to gratuitous passengers, but these cases are rare. It is contrary to public policy to allow a carrier to provide against his own negligence,

because in such a case he would use less diligence in providing careful and competent servants.

3. Liability for Baggage. — A common carrier is not only bound to receive as passengers all proper persons who apply, but he is also bound to accept and carry a reasonable amount of baggage. The liability of the carrier of passengers for the safe carriage of the baggage, is the same as the liability of a common carrier of goods for the safe transportation of merchandise. The only point of difficulty, and the only new problem presented is the question, What is baggage? As a part of his contract of carriage, for which the payment of his fare is a consideration, every passenger has the right to take with him a reasonable amount of certain articles, which properly come within the term "baggage." By baggage is meant such articles of wearing apparel or of personal convenience as are usually carried by passengers for use during the journey, or while sojourning at their destination.

The chief point of distinction between baggage and other property that might be offered for carriage, is that baggage must consist of such articles only as are for the personal use of the traveler. Other articles need not be accepted by the carrier, and if accepted when packed in such a way that his servants cannot tell whether they are baggage or not, he is not liable as an insurer. Thus clothing, jewelry intended to be worn, opera glasses, guns intended to be used for sporting purposes, etc., are baggage. But drummers' samples, money not intended for personal use on the journey, cloth for a third person, quantities of jewelry not intended to be worn, etc., are not baggage. If the passenger retains his baggage in his own custody instead

of delivering it up to the carrier, the latter is not held to the responsibility of an insurer.

If articles that are not baggage are carried on the person of the passenger, the carrier is under no liability at all. Thus, a passenger who carried twenty thousand dollars' worth of bonds on his person, and who lost all of them in a wreck, was not allowed to recover anything at all for the loss of the bonds. He had not intrusted them to the company and they were, moreover, not baggage. In general, also, the passenger must be the owner of the baggage he is carrying, and must, as a rule, accompany it. If, however, his trunk is sent ahead by special arrangement, it is deemed to be baggage, in spite of the fact that the owner does not accompany it. Finally, if the carrier accepts for carriage goods which are known not to be baggage, he will be liable as an insurer, for by so doing he has made a contract for the transportation of those articles, which contract contemplates the responsibility of a common carrier.

4. When the Liability Terminates. — The liability of the common carrier is, obviously, at an end as soon as the passenger has reached his destination, and has alighted from the train or boat in which he has been carried. If the passenger leaves the vehicle before he reaches the end of his journey, the responsibility of the carrier terminates at that time. If he does not leave of his own motion, but is put off the train or off the boat for improper conduct, or refusal to pay his fare, or for some other legitimate reason, the liability of the carrier then terminates. As in the case of a carrier of goods, the liability of one carrier terminates when he delivers the passenger to a connecting carrier for transportation on the next stage of his journey.

CHAPTER III

RIGHTS OF THE COMMON CARRIER OF PASSENGERS

1. Right of Compensation. — The carrier of passengers is of course not required to carry them without compensation. Inasmuch as he is bound to accept all proper persons who may apply, as long as he has room to carry them, he is not compelled to accept a passenger at all for transportation unless he has been paid fare in advance. This regulation is clearly necessary in order to protect the carrier against the public, whose servant he is.

2. Right to make Regulations. — The common carrier of passengers has a right to make all needful and proper regulations for the government of those who are under his care. He also has the right to enforce these regulations and, if necessary, to call in the officers of the law to assist him. Among such regulations is the one familiar to every one, requiring a person to pay a higher rate of fare in case he fails to purchase a ticket before entering the train. The regulation concerning the cars in which individuals shall go, and relating to the management of depots and stations, are regulations which the common carrier has a right to make and enforce.

PART VI

AGENCY

CHAPTER I

CLASSES OF AGENTS

1. **Necessity for Agents; Definition.** — Hitherto we have been investigating the nature and obligations of the contractual relation. We have also discussed the manner in which this relation may be created; but in so doing we have considered only cases where the contracting parties were themselves present, and either did the acts or said the words, by virtue of which they became bound. It is obvious that a very large part of the business of this world is carried on, not by the parties who themselves are most interested, but by others who have been appointed to act for them. This must necessarily be so by reason of the many duties devolving upon a single individual who is at the head of a large business, and of the fact that it is often necessary for different contracts to be made, and for different interests to be looked after, in widely separated parts of the earth at the same time. These things made the appointment and use of the agent a necessity.

An agent is he who is appointed to do something in the place of another. One thus appointed may, on

behalf of his employer, called his principal, do any act which he has been authorized to do, binding the principal as fully as if the latter himself had done the act. It is a general rule that an agent binds his principal for acts which he does, or agreements which he makes, only while acting within the scope of the authority which has been delegated to him by his principal. It then becomes important to note the classes of agents, the extent of the authority of each class, and the manner in which this authority may be conferred.

2. General and Special Agents.—Agents are usually divided into two classes, general and special. A general agent is one who has received from his principal a general authority to do certain acts. His authority is not limited to making one particular contract or doing one particular thing—he has more or less discretion. The general manager of a business is a general agent. He has authority to do any act necessary for carrying on the business, and his actions will bind his principal just as completely as if the latter had given him a specific authority to do each particular thing. Agents of this class have almost as much power as the principal himself, as long as they are acting within the general field of the business for which they are employed.

A special agent is one who has received no general authority to do any acts, but who has been given special authority to do some specific thing. If one has not been appointed general manager of a business, but has been authorized to make a particular contract, and attempts to make any contract except that one, he goes beyond his authority and does not bind his principal. If A employs B as an agent to purchase a particular horse for him, B has no power to purchase any horse

except the one designated. If he sees another which he thinks would suit his principal as well, and purchases him, the bargain will not bind the principal, for the agent has gone beyond his authority. But if he has been appointed a general agent to buy horses, and has been directed to purchase a particular horse at a particular time, then if he chooses to buy another which he thinks would suit his principal better, the contract will bind, because he has a general authority to purchase horses. The instruction to purchase a particular horse does not restrict the authority of the agent, but only expresses a preference on the part of the principal. A general agent may do many acts which he is not expressly commanded to do by his principal, and these acts will bind; but a special agent must be very careful not to depart from the strict letter of his instructions. Some authors object to this classification, on the ground that it is illogical; they say that the difference between a general and special agent is not a difference in their essential nature, but merely of degree. This may be true, but nevertheless it is simpler to think of agents as being divided into these two classes, because there is a real distinction as to the responsibility which each class is under.

CHAPTER II

CREATION OF RELATION OF PRINCIPAL AND AGENT

1. **Who may be Principal or Agent.** — It is a general maxim of the law that he who may do an act himself, may do it through the medium of an agent. It follows that he who may not do an act in his own person, may not do it through the agency of another. If a man is unable to make a contract he cannot, of course, become a principal and designate an agent to make it. Any one who is himself under a disability which would prevent him from contracting, cannot appoint an agent to act in his stead.

Infants, lunatics, and married women may contract by agents to the same extent that they may contract in their own persons, and no further. The limitations of the contracting power of these persons we have already discussed, and need not dwell upon them again at this time.

Practically, any one who has any discretion at all may be an agent, the mere exercise of authority not requiring the full capabilities of one contracting for himself. Infants, married women, etc., may be agents and bind their principals to contracts which they cannot make themselves. The principal is the judge of the discretion of his agent, and if he falsely relies upon

it, he has no one to blame but himself. It is probable, however, that an idiot or one *non compos mentis* would be incapable of acting as agent because of his total lack of discretion.

2. Delegation of Authority. — Having seen who may be a principal and who may be an agent, the next question is, How may the relation of principal and agent be created? When A expressly authorizes B to make a contract on his behalf, there can be no question that the relation of principal and agent is created. Whenever one man expressly delegates to another the authority to do some act for him, the relation of principal and agent is thereby established between them. If the authority is to make an ordinary simple contract, the appointment may be made either orally or in writing, at the option of the principal. If, however, one wishes to delegate to another authority to make a sealed contract, he must give to the agent a sealed instrument called a "power of attorney," by which he gives to him the requisite authority.

In most cases, however, where one man acts as the agent of another, there has been no express delegation of authority. The principal merely indicates what he wishes the agent to do, and the agency is created by the doing of those particular acts. Or it may be that by the conduct of the parties the relation has gradually been established. Perhaps he has, little by little, granted authority to the one who is acting for him. Suppose a lawyer employs an office-boy who at first does nothing but take care of the office and run errands; he becomes his agent for those purposes. Later on, as he grows older and becomes more capable, he is permitted to transact more or less business on the part of his princi-

pal, signing receipts, or even making contracts, and doing other acts of a like nature. Thus, without any express delegation of authority, the office-boy has become, perhaps, a general agent to do a certain class of acts. Perhaps the most common example of implied agency (apart from such situations as this where clerks, office-boys, etc., are impliedly made agents) are cases where men have allowed their wives habitually to contract for them, or have continually sent their children or servants to do acts which involve the power of agents. In this way the wife or servant or child becomes the agent to do the acts which they have been accustomed to do, and can bind the husband or master or father as completely as if there had been an express delegation of authority.

3. Agents by Necessity. — Sometimes the relation of principal and agent may be created without either an express or implied delegation of authority. This may happen only in unusual situations or under peculiar conditions. One partner is always the agent for the other partners, as we shall learn when we discuss the subject of Business Associations. Consequently, the mere creation of partnership relations constitutes each partner the agent of all the others.

Again, if a husband has gone away from home without providing adequate means for his wife's support, she, of necessity, becomes his agent so as to be able to bind his estate for the purpose of purchasing the necessities of life to supply herself and family. If a sea-captain, navigating a vessel, finds it necessary to repair his ship when he is in a foreign port, he may make a contract which will bind the owner of the vessel. If this were not the case he would be unable to repair the

ship, and the result might be its total loss. In all these cases the agent derives his authority from necessity.

4. Ratification of Acts done by Unauthorized Agents. — Sometimes a man who is really not an agent of another, will do an act upon his behalf and which purports to bind him. In such a case the principal is not bound in any way. He cannot be held responsible for the act of an individual to whom he has given no authority to act for him. If, however, after the act has been done, the principal approves it and ratifies it, then it will bind him. The situation is exactly the same as if the principal had delegated the authority to the agent before the act was done.

CHAPTER III

LIABILITY OF PRINCIPAL FOR ACTS OF AGENT

1. **Liability for Contracts.** — When an agent makes a contract on behalf of his principal, he binds not himself, for he is only the instrument, but his principal, provided he is acting within the scope of his authority, or if the principal ratifies his act. The most important thing to ascertain in such cases is whether the agent has acted within the scope of his authority. In order to determine that, it is necessary to know the exact extent of the authority delegated. Here the importance of distinguishing between the general and special agent is obvious. One who has been delegated to do a single act can bind his principal for nothing else. But if an agent has been delegated to do a certain class of acts, and has been accustomed to do those acts, and the public has come to understand that he has a general authority for that purpose, it would be unjust not to permit him to bind his principal, as long as he is acting within the general field in which he has power to act, because otherwise the public would be defrauded.

If I constitute A an agent to purchase for me a certain house, and A buys another which he thinks as good a bargain, the act does not bind me. My agent being special, all persons dealing with him are bound to ascertain the extent of his authority. But, on the

other hand, suppose I am an extensive dealer in real estate and A has for many years bought for me. I tell him to purchase a particular house, and he oversteps his instructions to the extent of purchasing another one. There you see we are in a slightly different position. The public knows that A buys houses for me, therefore the seller is protected, and the bargain binds me. It may be laid down as a general proposition that a special agent cannot bind his principal, even though he is acting for him and in the course of his business, unless he is strictly within the letter of his instructions. But a general agent, if he is acting in the general scope of the employment in which he is accustomed to act for his master, binds him, even though he may not conform exactly to his orders. A special agent has no authority which the principal has not expressly conferred; a general agent has all the authority which the acts of the principal seem to confer upon him.

2. An Agent must always Act for his Principal. — In all cases, whether the agent be general or special, the act which he does must be for the benefit of the principal, or else it will not bind the latter. By this it is meant that if the agent does an act entirely on his own behalf and not on account of his principal, he cannot be acting within the scope of his authority. This is a very delicate question and sometimes leads to difficulties, because it often results in the deception of the public. An attorney who had a general authority to discount all bills of exchange for his principal, discounted two bills of exchange to obtain money for his own use; the court decided that inasmuch as he had done the act for his own benefit, and not for the benefit of his principal, it did not bind the latter. The indorsement, therefore,

which the agent placed upon the bill was held not to subject the principal to any liability. This is a very doubtful decision. From the standpoint of the party who discounted the bill, it made no difference what the secret intention of the agent might have been. The third party would seem to have had a right to rely upon the apparent authority. In most cases the third party is safe in relying upon this apparent authority, for if the principal has given apparent authority to the agent, he will not be allowed to deny that he gave him real authority.

3. The Public may Rely upon the Apparent Authority of an Agent. — It is a general rule of law that a principal is bound to the extent of the apparent authority which he confers upon his agent. Even though he may not actually have intended to confer as great an authority as he appears to have conferred, yet he is bound; otherwise the public would be deceived. If a principal delegates to another an apparent general agency, but gives him secret instructions limiting his power, these secret instructions will not vary the rights of innocent parties who have dealt with the agent.

A sent B to the South to buy cotton at a time when the armies of the North and South were engaged in active hostilities. A secretly instructed B to include in all contracts a stipulation that no cotton was to be paid for until it was landed at St. Louis. B purchased cotton in the usual way and it was shipped on the Mississippi River. It was destroyed in transit. A contended that there was no contract, as B had exceeded his instructions. It was decided that the contract bound him. He had given his agent the apparent authority to purchase cotton in the usual way, and he

could not now be allowed to say that he had not given him real authority.

4. Liability for Torts; Reason for Liability. — Not only does the agent subject his principal to liability for contracts which he makes while acting for him and within his instructions, but he also subjects him to liability for all wrongs or torts which he commits while he is acting in the general course of his principal's employment. Suppose you are run over by a street car, by reason of the negligence of a conductor. You may sue the street-car company and recover damages, not because the company did the act, nor because it carelessly selected its servant, for it very probably did neither; but because from time immemorial the act of the agent has been said to be the act of the principal, and therefore the latter is responsible in damages for it.

There is no logical reason why a principal should be liable for his agent's wrongful or negligent acts. The origin of the rule is historical, and not logical. In ancient times, a servant or slave was considered merely as a thing or chattel. If the slave killed a man or injured him greatly, the slave would be given up to the injured man, or to his family, for vengeance. After a while, a master who had valuable slaves would seek to compromise a case where such a tragedy had happened. He would offer to pay the amount of the damage if he might be allowed to retain the offending slave. Probably from this custom was deduced the rule that whenever the slave, or in modern terms, the agent, does an act, the principal, who has replaced the master, must pay for it.

5. How Far the Principal is Liable for Torts. — The problem which most concerns us to-day is, For what

torts is the principal responsible? The answer, in general terms, is, For all torts committed while the agent is about his master's business — while he is acting within the scope of his principal's employment.

A, who was the proprietor of a livery stable, ordered a driver, B, to drive to the stable and put up his team. B drove in exactly the opposite direction to deliver a parcel, intending afterward to go on around to the stable as directed. While on the way he ran over a man and badly injured him. The court said that the servant was acting for the master inasmuch as ultimately he was going to the stable: therefore the principal was held liable. If, however, to use the expression employed in a case very similar to the above, the servant is going off on "a frolic of his own," he will not subject his master to liability for his torts. The tort must be one that was committed at a time when the agent was acting for his principal and within the general scope of his authority.

6. Principal not Liable for Malicious Wrongs.—It is sometimes very hard to tell whether the agent is acting for the master or on his own account. A brakeman on a freight train ordered a boy, who was stealing a ride, to get off; the boy refused; the brakeman undertook to put him off, and, on account of some resistance on the part of the boy, became very angry and roughly threw him off while the train was moving. The boy's leg was cut off, and he sued the company to recover damages for the injury. It was contended that the company should not be responsible, that the act of the brakeman was a willful act, as he was not instructed to throw boys off moving trains; but the court decided that the company was responsible, because the

brakeman had been ordered to put all trespassers off of the cars. While his act was unnecessarily rough, it was within the general scope of his orders.

If, however, an agent does an act out of pure maliciousness and not to further the interests of his employer, then he cannot subject him to liability. A brakeman requested a passenger who was smoking in the wrong car to leave it and go into the smoking-car. The passenger refused, and, after angry words passed between them, the brakeman struck the man over the head with his lantern and severely injured him. The court decided that the company was not responsible, for under no view of the case could it have been the duty of the brakeman to hit passengers over the head with his lantern. The act which he did was not done in the interest of the company.

7. Where the Agent is Guilty of Deceit. — There is a certain class of torts in which it is necessary that the person charged shall have been guilty of moral wrongdoing. You will remember from our discussion of fraud that one is not liable in deceit unless he has either willfully or recklessly lied. There has been some dispute as to whether a principal can be held liable in deceit for a fraudulent act which has been committed by his agent.

Some writers take the view that the principal is held responsible for the negligent acts of his agent, because the principal constructively may be charged with negligence, inasmuch as he has hired the servant who has been careless. These writers say that where the wrong of deceit is involved you cannot charge the principal, for, in order for the wrong to be complete there must have been some moral wrongdoing on the

part of the individual to be charged, and, inasmuch as the fraudulent act is committed entirely by the agent, it is impossible to impute his wrongdoing to the principal. You cannot say that the principal has been guilty of a willful wrong, consequently he is not charged unless he has actually had some part in the deceit.

This view is an absurdity. The principal is chargeable not because he is guilty of a wrong, for he is not, but because, by virtue of his relation to the agent, he has taken upon himself the liability for all wrongs done by the agent while acting within the scope of his authority. It is incorrect to say that the principal is constructively charged with the wrongdoing of his agent; as a matter of fact, in almost every case the principal cannot in any way be said to be morally responsible for the act of his servant. The real reason for his liability is, that when he engages in business and hires servants to work for him, he assumes the common law liability for the acts of those whom he employs. As we have before indicated, this liability is based upon no logical reason,—it is merely fastened upon all persons who choose to conduct business under such circumstances. The principal, therefore, is responsible for all torts, irrespective of their nature, as long as they have been done for his benefit and within the scope of the authority of the agent. The later decisions have adopted this view.

8. Where there are Sub-contractors. — A question often arises as to who employs the servant who has done the act. Suppose you own a lot of ground and desire to build a house. You employ a contractor to erect the building. He sublets the contract to a builder, who

employs a painter, whose assistant carelessly drops a beam on the head of a stranger. Whose servant was the wrongdoer? The painter's, the builder's, the contractor's, or yours? A few years ago you would have been held responsible. At the present time you would not be. The man is the servant of the independent contractor who employed him. If the painter was such a contractor, then no liability could exist beyond him.

9. Liability for Crimes. — It may seem very strange to say that one man could ever be responsible for the crimes of another, nevertheless there are crimes which may be committed by the agent and for which the principal is held responsible. Such crimes as murder and robbery could never be committed by the agent, while acting within the scope of the authority delegated to him by his master, unless the master at the same time was really the murderer or the robber; consequently the consideration of such a situation does not enter here. In all such cases the parties are equally guilty. But there are some crimes which may be committed by the agent while he is acting within the scope of the authority delegated to him by the principal, although the principal did not directly contemplate them.

It is a criminal offence in most states to publish libelous matter. The owner of a newspaper may be criminally prosecuted for libelous matter which has been published by his agent, without his orders and without his knowledge. In most states there is a special provision that in case libelous matter is published about a man who is running for public office, or any individual whose reputation is properly before the public for discussion, the one responsible for the publication cannot

be held criminally liable unless his act was done maliciously or carelessly.

There are a few other situations where a principal may be responsible for the crime of an agent. In many states it is a misdemeanor to sell liquor to minors. An owner of a saloon may be responsible for the acts of the barkeeper in selling to minors, although he did not give directions to sell to them, and even if he has given specific orders against it.

CHAPTER IV

LIABILITY OF THE AGENT FOR HIS ACTS

1. For Torts. — An agent is always responsible for the torts which he commits. We have learned that the principal also is responsible, but this does not relieve the agent from responsibility. As a matter of fact, the one who is sued in nearly all cases is the principal, for the practical reason that the agent is not usually financially responsible. Nevertheless, sometimes an agent is almost as responsible as the principal. In such cases it is simpler to charge the agent directly, because then it is not necessary to enter into the question as to whether he was acting within the scope of his authority. If the agent is acting beyond the scope of his authority the principal is not liable; and in such cases, therefore, the agent is the only one who can be charged.

2. For Unauthorized Contracts. — We have explained that an agent binds his principal only for those contracts which he makes while he is acting within the scope of his authority. But if an agent has made a contract which is beyond his authority, the principal is not liable, because he has never consented, either directly or indirectly, to be bound. The only person who can be held responsible in such a case is the agent. Strictly speaking, he cannot be held responsible as a party to the contract, because he did not purport to make

the contract on his own behalf; but he is responsible for damages to the third party, for any loss which may have been incurred by reason of his false representation that he had authority to make the contract when he had not. He is responsible, whether he made the false statement innocently or not.

3. Where the Principal is not Named; Rights of the Third Party. — It sometimes happens that an agent makes a contract with a third party and does not disclose the name of the principal, or perhaps even conceals the fact that he has a principal. If he discloses the fact that he is an agent, but does not name his principal, the question as to whether or not you can hold the agent on the contract depends upon the terms of the agreement. If it clearly indicates that the agent contracts as agent, acting for a principal as yet unknown to the third party, then the latter is giving credit to the unknown principal, and if the latter repudiates, the agent cannot be held.

If, however, the contract does not expressly state that the agent is an agent, but leaves it doubtful whether he is contracting on his own behalf or for some unknown principal, then the third party has the right of election; he may charge which one he prefers, either the agent or the principal, but when he has elected to hold one he cannot thereafter hold the other.

It has been suggested that to allow an undisclosed principal to be brought into a written contract, made between an agent and a third party, would be to conflict with the well-known rule of law that no oral evidence can be brought in to vary a written contract. This objection, however, is not valid. If the agent were allowed to free himself from liability by bringing

in the principal, there would be ground for this objection, but the agent is not permitted to do this. The third party may bring in evidence to show who the principal is, in order to hold him responsible, but the agent cannot in any way lessen his own liability by so doing. A party may be added to a written instrument by oral evidence, but one may not be taken away.

4. Rights of an Undisclosed Principal against the Third Party.—In the case which we have been discussing, suppose the third party is the one who seeks to break the contract: Who may hold him responsible, the agent or the hitherto undisclosed principal? The rule is, that either may do so. When he has disclosed himself, the principal may come in and sue the third party, if it does not appear by the terms of the contract that the agent alone is chargeable. When he is sued by the principal, the third party may urge any defence against him that he could have set up against the agent.

Suppose A makes a contract with B for the purchase of certain stock; A pays B half of the amount due under the contract; afterwards C is shown to be the real principal for whom B was selling the stock. In the meantime, B has absconded without paying any of the money over to C which he received from A. C sues A under the contract to recover the entire amount. C may recover from A only the amount remaining unpaid. A would have had a defence of part payment as against B, and he has the same defence as against C.

CHAPTER V

MUTUAL DUTIES OF PRINCIPAL AND AGENT

1. Compensation and Reimbursement. — Every principal owes to his agent the duty to pay him a reasonable compensation for his services, and the agent may retain funds belonging to his principal until he is paid. The agent is also entitled to be reimbursed for any expense or injury he may have suffered on behalf of his principal, provided it was legitimately incurred while he was acting within the scope of his authority. A, while in an island of the West Indies transacting business for B, fell under the displeasure of one Christophe, who was at that time president of the island, and was condemned to pay a fine of three thousand dollars or else to fight a duel to the death with a person designated by the president. To save his life the agent paid the money, and subsequently sued his principal to recover the amount. It was decided that he could recover. The expense was incurred by the agent while acting for his principal, and the latter was bound to reimburse him. It may be stated as a general rule, that whenever an agent is subjected to loss by reason of some duty which he has performed for his principal, the latter is bound to make the loss good.

2. Responsibility for Personal Injuries; the Fellow-Servant Rule. — Although the master is responsible for

injuries caused by third parties, if received by his servants while acting within the scope of their employment, he is not responsible in damages to a servant or an agent for an injury incurred through the negligence of a co-worker, technically known as a fellow-servant. The reason for this is not very satisfactory. The rule is justified by saying that when a servant hires himself to work for a master, he assumes to take upon himself all the risk of injury resulting from the nature of the employment. It is said that, inasmuch as he has assumed this risk, he cannot charge his master for an injury which he suffers as a result of it, and that all injuries which he receives on account of the negligence of fellow-servants, are injuries the risk of which he takes upon himself when he enters into the employment of his master. This assumption is untrue in fact. An employé does not actually assume such risks, and there seems to be little reason for implying such an assumption. But however unsatisfactory the reason of the rule may be, it exists in practically all the states.

In some states the word "fellow-servant" is construed to mean only those who are in the same grade of employment. Two engineers, two conductors, two motormen, or two track-walkers would be fellow-servants, but an engineer and a conductor, or a track-walker and a brakeman, or a motorman and a workman in a machine shop, would not be, even though employed by the same master. In other states, particularly in the state of Pennsylvania, practically all who work for the same master are classed as fellow-servants, so that it is really impossible for a workman who has been injured through the negligence of another workman who receives his wages from the same source, ever to recover anything

on account of his injury. Of late years a movement has begun to develop, the tendency of which is to limit, and perhaps finally to abolish, the fellow-servant rule: it is to be hoped that it will succeed. The man who is thus injured deserves to receive compensation for his injuries as much as any one, perhaps more so. It seems unjust to deny a recovery in his case and to permit it in others.

3. Absolute Duties. — Although he is not responsible for injuries caused by his own servants to each other, there are certain obligations which the master is under toward all of them. He is bound to supply a safe place to work in, safe machinery to work with, and competent fellow-servants. By this latter it is meant that notoriously careless or incompetent servants must not be employed. To do so is negligence on the part of the master.

The principal must also make suitable rules and regulations to govern the actions of his employés, so as to protect them from injury as much as may be. A, a contractor, employed B, an inexperienced workman, to erect a scaffold upon which C was to work. The scaffold was improperly constructed, and, by reason of that fact, C fell and was injured. C was allowed to recover, although B was a fellow-servant. A, by hiring an inexperienced workman to erect the scaffold, had failed in his absolute duties. He himself was guilty of negligence.

In such cases, if it appears that the master has failed in some of these duties, he is responsible, even though he is not shown to be actually negligent; his failure to provide safeguards makes him responsible without any imputation of carelessness. Moreover, even though the servant may have known of the defective machinery with

which he was working, this will not prevent a recovery, although it may be evidence of contributory negligence which the jury may take into consideration. Where an elevator-boy was injured by the fall of an elevator which was caused by a defective rope, the evidence showed that he knew the rope was in a dangerous condition, but, nevertheless, he was permitted to recover.

4. Obedience, Diligence, and Skill. — On the other hand, when an agent enters into the employ of his principal, and undertakes on his behalf the duties which are assigned to him, he must exercise diligence and skill, and he must be obedient to the orders which he receives. If he fails to obey his master or if he fails to use his own skill, or if he is less careful than an ordinarily prudent man under the circumstances would be, he has failed in his duty toward his master, and may be held responsible by him. Thus, to revert to a previous illustration, if a principal secretly instructs his agent to buy cotton, only on condition that no payment is to be made unless the goods actually arrive at their destination, — while the acts of the agent outside of his instructions may bind the principal, yet they are in disobedience to his orders, and the agent may be charged with the resulting damage.

5. Loyalty. — The agent is also bound to be loyal to his master; by this we mean that he may not secretly give a part of his time to some other pursuit, when ostensibly he is working only for his principal; and more particularly do we mean that he must not enter into the service of some one whose interests are antagonistic to the interests of his principal.

Suppose A is the owner of a house which he desires to rent. He employs B to secure him a tenant. B sub-

sequently meets X, who is searching for a house suitable for him to rent and occupy. X employs B to find a house for him. Without disclosing his double agency to either party, B conducts the negotiations between the two. He is bound to injure one or the other of his principals. Inasmuch as their interests are antagonistic to each other, he cannot possibly serve both. In such a case, had he frankly disclosed the situation to both parties and allowed them to come together, there would be no objection to the transaction. Otherwise, he has been guilty of disloyalty to one of them and is liable in damages. It is also generally understood that when a servant is employed, he must perform his duties himself and not delegate them to some one else. In the absence of an agreement that he shall be allowed to do this, such a delegation would be disloyalty.

CHAPTER VI

HOW THE RELATION OF PRINCIPAL AND AGENT MAY BE TERMINATED

1. By Act of the Parties. — Having discussed the various rights and duties of principal and agent, we now ask how this relation may be brought to an end. The simplest manner, perhaps, is by revocation of authority on the part of the principal, or by renunciation on the part of the agent. The principal is always at liberty to dissolve the relation by merely notifying his agent that he is no longer to act for him. This revocation of authority is of no binding effect until it comes to the knowledge of the agent. Contracts which the agent has made in the meantime, therefore, will still bind the principal.

There is, however, one kind of agency which may be mentioned, where the principal is not at liberty to revoke the authority. If A delegates B as his agent to do some act which will result in profit to B, and in consideration of this delegation of authority B pays value, A is not allowed to revoke. In such cases the authority is said to be irrevocable. Suppose A lends one thousand dollars to B, and, as collateral security, B gives to A one hundred shares of stock, with a power of attorney to sell the stock in case the debt is not paid at maturity. In such a case, B could not revoke the authority given by the power of attorney. If he did not pay the debt at maturity, A could sell the stock

in spite of any attempted revocation on the part of B. A renunciation of his agency by the agent will, of course, sever the relation as completely as a revocation on the part of the principal.

2. By Death. — As it is quite impossible for a dead man to make a contract, either personally or through the means of an agent, consequently, if the principal dies the agency terminates at once. It is not necessary for the fact of the principal's death to come to the knowledge of the agent; the authority is revoked at the instant when the principal ceases to exist. Consequently, if an agent makes a contract with a third party before he is aware of his principal's death, the contract binds no one.

3. By War. — If an agent and his principal are upon different sides in case of a war between two countries, the breaking out of the war will terminate the relation. A was an insurance agent who lived in the South — his company being located in New York. The breaking out of the War of the Rebellion interrupted the agency of A. Although he had received no formal revocation of his authority, the contracts which he made in the meantime did not bind his principal.

4. Insanity of the Principal. — If a principal has become insane, he has, as we have already learned, become incapable of making a contract, and it follows that his agent can no longer make contracts on his behalf, for a man cannot do by an agent what he cannot do himself. It has been decided, however, that the authority of an agent to make contracts is not terminated by the insanity of the principal until the knowledge of such insanity has been conveyed to the agent.

PART VII

BUSINESS ASSOCIATIONS

SECTION I

PARTNERSHIP

CHAPTER I

ESSENTIAL CHARACTERISTICS OF A PARTNERSHIP

1. Nature of Business Associations.—Heretofore we have dealt only with contracts which were made, or with business which was transacted, by single individuals, acting either personally or by means of an agent. We now take up the discussion of associations of individuals, which are formed for the purpose of transacting business in a manner more advantageous to the members of the association than a business conducted by them individually would be. Men who are engaged in business, finding that it will be mutually beneficial, often join their capital, experience, and labor with each other, providing that the profits of the enterprise may be shared by the members of the association, either equally or in proportion to the capital or business experience contributed by each. This is the first step in the concentration of capital, energy, and talents. The first form of such business associations is the partnership.

2. Who are Partners. — When men have entered into the relation of partnership, they subject themselves to certain responsibilities, not only for their own actions but for the actions of their partners. We cannot fasten this responsibility upon any individual until we have shown him to be a partner. The first question, therefore, to be investigated is, What do we mean by the word “partnership,” and when are men partners? Suppose that A and B each conduct a retail dry goods store on a certain street. They conclude to hire a larger building and carry on business under one roof. Their expenses are lessened, the attractiveness of the store is increased, competition is done away with, and the profits are proportionately larger. Now suppose that A borrows a large sum of money, ostensibly for purposes of the firm, but without B’s knowledge, and then quietly leaves the country. If B is A’s partner, he is responsible for the repayment of the money borrowed; if he is not A’s partner, then he is under no such obligation. In the case here stated, A and B would undoubtedly be partners.

3. No Agreement Necessary to Create a Partnership. — When we say that individuals are partners, we do not necessarily mean that they have come together and have agreed among themselves that they shall be partners; that they have perhaps drawn up articles of agreement which they have signed, and which purport to create a partnership. While some partnerships are so formed, it is probable that the majority are not thus expressly created.

Parties may assume a partnership relation and partnership obligations without intending to do it. The law judges whether or not they are partners by their actions, even more than by their words. In the

illustration in the preceding paragraph, it is possible that A and B thought nothing about whether or not they were partners. They were perhaps not aware of the fact that joining their stocks and doing business together under one name and in one room would constitute them partners; but such was the fact.

4. How to Determine when a Partnership Exists. — It is sometimes very difficult to determine whether individuals who are associated in business together are or are not partners. If A and B were in business together, and divided the profits between them, either equally or in proportion to the capital which each had contributed to the business, it was formerly supposed that they were partners, and that it would not be necessary to investigate further.

That view of the case has been modified to some extent. It is quite possible for two individuals to share profits without being partners. Suppose A lends B ten thousand dollars with which to begin business, and stipulates that instead of interest he is to receive annually two thirds of B's net profits. If A has no control whatever over the business, and has nothing to do with the active management of it, he is not a partner even though he shares the profits. Employés who receive a share of the profits of the enterprise, instead of wages, are not partners. Thus you see, profit-sharing is not necessarily conclusive as to whether two or more persons are partners. Another very important element to be considered is whether the individuals jointly own the property which is being used in the business. This, however, is no more conclusive than is the test of profit-sharing. It is evidence, but it does not prove anything by itself.

5. The Real Test is Co-proprietorship. — The real test as to whether or not individuals who are in business together are partners, is whether they have a co-proprietorship in the business. By this we mean whether each one has more or less active control over the management of it. If A lends B money, stipulating that he shall receive a certain share of the profits, we have seen that so long as A has no control over the business, he is not a partner.

Suppose A had stipulated that no new enterprise was to be undertaken without his consent, still he would not be a partner; he has a restraining influence, but not an active influence over the business. If, however, he actively participates in the management of the operations which are undertaken, if his advice is sought and followed with regard to the initiation of new features, and particularly if he himself is so actively engaged as to have the power to inaugurate the steps to be taken — then he is a partner. It may be safely said that if two parties are in business together and share profits and own property in common, and each one has some control over the business, they are partners. We cannot well lay down any rule more definite than this. Some one of these elements may be present and the others absent, and individuals thus associated may not be partners, — probably are not, — but it is impossible to say, without knowing all the circumstances of each particular case. Of all these elements the most important is that of co-proprietorship.

6. Quasi or Nominal Partners. — It often happens that two parties are doing business together when there is an express agreement between them that they are not partners and shall not be held responsible for partnership liabilities. The question might arise in such a

case whether it would be right for the law to deem them to be partners when they have expressly repudiated the relation as between themselves—whether, indeed, the relation of partnership is not, after all, a sort of contract which the parties have made between themselves, either impliedly or expressly. After they have expressly stipulated that such a relation shall not exist, ought the law to fasten the responsibility of it upon them?

At the same time, looking at the situation from the standpoint of a third person, who has dealt with the firm believing the individuals to be partners, we can see that it makes very little difference to him what contract the different individuals may have secretly made with each other when he has been relying on the apparent partnership between them. If a man acts in such a way as to lead other persons to believe that he is the partner of another man, he cannot afterwards escape his responsibilities toward those who have been deceived by his actions. If the third person who was dealing with him knew, as a matter of fact, that he was not a partner, then, although he may have held himself out to the world as a partner, that individual cannot hold him responsible. But it is a general rule that whenever a man acts in such a way as to deceive the public into believing him to be a partner of some one else, he is responsible as a partner to all persons who have dealt with him under the belief that he held this relation to another. Such an individual is a “quasi” partner. This word comes from the Latin, and means one who acts as if he were a partner. Such a relation may be formed in perfect good faith, but nevertheless the responsibility of partnership attaches.

CHAPTER II

PROPERTY OF THE PARTNERSHIP

1. Legal Title in the Partners Individually. — Having ascertained some of the rules by which we determine whether or not individuals are partners, we now assume that we have a partnership which is in the possession of a business and a large amount of property, and we ask ourselves, What is the exact relation of the property to the partnership? Who owns the property and who may deal with it?

It is impossible, in an elementary work of this character, to go deeply into the nature of a partnership, viewed from a theoretical standpoint. We may observe, however, at this point, that the partnership is only a collection of individuals. You cannot think of a partnership without thinking at the same time of the individuals who compose it. The partnership itself is not distinct from its members. We shall see, when we begin to study corporations, that a corporation is a legal person and is a thing that exists, at least in contemplation of law, entirely distinct from the persons who compose it. But it is not so in the case of a partnership. As we shall see, a corporation may own property in its own name; but it is impossible for a partnership thus to own property, because the partnership, as such, has no distinct existence. It follows that the legal

title to the property owned by the partnership must be in one or more of the individual members of the firm. Suppose A, B, and C are partners: A owns a store; B owns a warehouse; C owns horses and wagons and stock. That property may be all property of the firm, although the legal title is in these individual persons.

2. Partners Hold only as Trustees. — Assuming that each partner legally owns that particular part of the property which stands in his name, we now inquire to what extent he may sell it or deal with it irrespective of the rights of his fellow-partners. It is clear that complete freedom could not be allowed, because the business of the partnership could not be satisfactorily conducted on such a basis. It is true that each partner has a legal title to a portion of the firm property, but he holds it as trustee for the partnership. If you are the guardian of X, who is a minor, and his property is placed in your hands, you cannot deal with that property as you see fit. You cannot sell it for your own benefit. You are bound to deal with it only for the benefit of X, because you are a trustee for X. In the same way the partner who holds a legal title to firm property, holds it as trustee for the firm, and must use it for the benefit of the firm.

A. Survivorship of Legal Title. — If a partner dies, that terminates the relation of partnership between the partners. What becomes of the legal title to the property which was owned by that partner and held by him as trustee for the firm? Does it go to his personal representatives so that they may come in and deal with it, and thus hamper the adjustment of the business of the firm, or is it disposed of in some other way? There is a peculiar rule in the common law which applied origi-

nally only to tenants who are known as "joint tenants." If A and B jointly own a farm, to use the expression which was employed to describe this kind of tenancy, each one owns the whole and each part of the land. This seems to be an absurd statement, but it means that the rights of the two jointly extend over the whole property. That is, it cannot be said that one owns part of the property and the other owns another part; both own the whole. In such a case, if A should die, the title of the entire property would remain with B and would not go to A's heirs. The same rule has been applied to the case of partners. If one partner dies, the personal property, the legal title to which he held as trustee for the firm and which would otherwise have gone to his personal representatives, becomes the property of the other partners, so that they may deal with it as they see fit for the purpose of winding up the business. The title to real property does not survive, but it may be dealt with almost as if it did by the remaining partners.

B. What Each Partner owns. — We have seen that each partner's claim to the property to which he happens to have a legal title is only a claim as trustee, and is really of little benefit to him personally. A claim to a share in a partnership is, however, a valuable one. It may then be asked, In what does this valuable property, which each partner personally owns, actually consist?

Suppose A, B, and C are partners, and the firm owns a large office building worth five hundred thousand dollars. Does each partner have a claim to one third of the building, so that he can sell one third of it if he chooses? If he dies, will the title to one third of the building go to his heirs?

We must remember that the firm, as a firm, owes, no doubt, certain obligations to third parties. Perhaps the building is heavily mortgaged for a firm debt. Perhaps there are a number of creditors to whom the firm owes money. Perhaps the amount of liabilities is even greater than the value of the property. We would have to take all these things into account before we could even estimate the real value of a share in that partnership. Under the last supposition, each partner's share in the firm would be worth nothing at all. It might be perhaps worth even less than nothing.

In order to estimate the property which each partner owns, we must consider it in this manner. Each partner has a right to share any money which remains after all the firm debts have been paid. This is a personal claim, and his share in the partnership is personal property. In technical language, his right is called the right to "have an accounting," that is, the right to have the property sold, the money applied to the payment of the debts, and the surplus divided among the partners. If the property is valuable and the debts few, this claim is very valuable. If the property is small and the debts large, the partner would be very glad indeed to relinquish all rights which he has if, at the same time, he could be relieved from all his liabilities. If he sells his share in the partnership, he does not transfer the firm property, or any part of it, to the purchaser. He sells only the right to share in the surplus after all the debts have been paid—he sells the right to an accounting. By such a sale of his rights a partner cannot introduce another member into the firm, but he does give him the right to share what is left after the business has been settled up. A new member

can be introduced into the firm only by the unanimous consent of all the parties.

C. To Whom the Partner's Share goes when he Dies. — It has been suggested that a partner's share in the firm property is personal property. Suppose all the property which is owned by a firm is a large lot of real estate. Suppose the firm is composed of A, B, and C. A dies, leaving an heir, X, and appoints an executor, Y; the question is, Does the partner's share go to X, as it will do if it is real estate, or will it go to Y, as it will if it is personal property?

All the property owned by the firm was real property, but as soon as it was purchased by the firm it became personal property. This is a fiction of the law, invented for the purpose of facilitating the transaction of business. The property is treated as being personal property as long as it is owned by the firm. As soon, however, as the firm's business is all settled up, and the fund is ready for distribution among the surviving partners and the representative of the dead partner, it is again treated as being real property, and the money thus remaining is paid to the heir of the deceased partner, and not to his executor. That is the rule in this country. In England, it is somewhat interesting to know, the proceeds of the sale would go to the personal representatives, because it is treated as being personal property absolutely, and not real property.

CHAPTER III

LIABILITY OF THE PARTNERS

1. General Nature of a Partner's Liability.— A partnership relation is one which has long been recognized by the common law. The responsibilities of the partners have therefore become well settled. The individuals who enter into such a relation are the gainers, in that they have succeeded in concentrating their capital and lessening their expenses, but they do not escape any of their usual responsibilities as traders by so doing. Partners are under a double liability. In the first place, the partnership property is fully liable to the creditors of the partnership for all obligations owing to them. But if it is not sufficient to pay the debts, the personal property of the various individual partners may be called upon for that purpose by these creditors of the firm. If one of them is compelled to pay the whole amount of the firm debt, he may, by bill in equity, compel the others to share his loss.

2. Rights of Firm Creditors when Firm is Solvent.— Judging the rights of the creditor of the firm from a strictly legal standpoint, as distinguished from an equitable standpoint, he has the right at any time to take the property of the firm, or the property of the individual partners, to satisfy his claims. As long as the firm is solvent, however,—that is, as long as the property

which it owns is greater than the debts which it owes, and the firm creditor depends upon the firm property for the payment of the debts due him,—his rights will not conflict with the rights of any other creditors. It must be remembered, however, that not only may a man have creditors who have claims against him, by virtue of the fact that he is a member of the firm, but that he may also have creditors who have claims against him personally, which claims have nothing to do with the partnership. In such cases it will readily be seen that situations might arise in which the claims of these two sets of creditors would conflict with each other.

3. When the Firm is Insolvent and there is Firm Property.

—When a firm has become insolvent, that is, when its assets have sunk below its liabilities and the partners have decided to give up their business and distribute its property among their creditors, then this conflict between the different sets of creditors necessarily arises, and it becomes the duty of a court of equity to distribute the assets among them upon a proper basis.

We will suppose that A, B, and C are partners. Their firm property amounts to \$5000. A has no property except his interest in the firm. B is worth \$5000, and C is worth \$15,000, apart from their interest in the firm property. X is a creditor of the firm to the amount of \$25,000. Y is a creditor of A to the amount of \$2000. Z is a creditor of B to the amount of \$5000. How shall their claims be adjusted?

X, the firm creditor, may take all the firm property, \$5000. That reduces his debt to \$20,000. Now he may take the separate property, if there is any, of A or B or C, or all of them. He cannot go to A, for A has no separate property. He could go to B for the amount

of the property which he has, \$5000, were it not for the fact that B himself is insolvent, in that he owes Z to the full amount of his property. In the particular case which we are discussing, X would go to C and take his \$15,000 worth of property to satisfy the residue of his claim, \$20,000. Y would not get anything. He can get nothing from A's personal property, for A has none; he can get nothing by reason of A's relation to the firm, because A's share in the partnership is worth nothing. Z, the creditor of B, will get B's \$5000. X, the firm creditor, will get \$5000 from the firm and \$15,000 from C.

4. **"Doctrine of Marshalling."** — This is perhaps all plain enough, except the reason why X cannot take B's property. The reason he cannot depends upon the peculiar equitable doctrine known as the "Doctrine of Marshalling." In this illustration, X, having taken all the firm property there was, had the right to go to either B or C. He had two funds from which he could attempt to pay himself; Z, however, could not take the firm property, for his debt was not a firm debt. He could not take property of C, for he had no claim upon him. The only fund open to him was that which belonged to B, and which amounted to five thousand dollars.

In such a case, if X, either because he wished to injure Z, or because he could not get the entire amount from C, wished first to go to B and take all his property, equity would step in and forbid him. The court would say to him, You have two funds which you can take to pay yourself; Z has but one fund; you cannot go first to the fund against which Z has his claim, but you must leave that to him and first draw upon the fund

against which there is no other claim. This is a fair way of arranging the matter, otherwise it might be possible for X to have been paid in full, whereas Z would get nothing at all.

The foregoing principles may be stated as follows: The firm creditor has a prior right to take the firm's estate for the payment of his debt; the separate creditor (*i.e.*, one who has a personal claim against a partner) has a prior right to take the separate property of the partner against whom he has his claim, for the payment of his debt. If the separate partner has any property left, the firm creditor may take that, but he may not make any claim upon the separate property of the partner until all the separate creditors have obtained the amount of their debts. This is fair, because the firm creditor, when he contracted with the firm, was relying chiefly upon the credit of the firm property and not upon the credit of the separate partners. At any rate, inasmuch as he has the first claim to the firm property, he should not also have the first, or even an equal claim, to the separate property, but should leave that to the prior claim of the separate creditor.

5. When there is no Firm Property. — The principles which we have just stated apply only to cases where there is property belonging to the firm. If there is no property belonging to the firm, inasmuch as there is nothing at all with which to satisfy the claim of the firm's creditor except the separate property of the different partners, he is allowed to come in equally with the separate creditors. If a partner has personal property amounting to \$10,000, and a firm creditor and a separate creditor each has a claim of \$10,000, which will get the property? It will be equally divided between them;

each will receive \$5000. Again, as you see, this is a fair and equitable method of arranging the claims between the parties, for the reason that otherwise the separate creditor would be paid in full, whereas the firm creditor would get nothing.

6. When a Partner is Dead.—If a partner dies, the liability of his estate for the payment of both firm and separate debts is precisely the same as if he were living. As we have already stated, the surviving partners may use the property to which the dead partner held the legal title for the purpose of settling up the accounts of the firm and closing up the business. They cannot, however, subject the estate of the decedent to any new obligations, other than such as are absolutely necessary in order to conclude the business.

Suppose A, B, and C are partners; C dies, and A and B give a promissory note for a large amount of money to engage in a new venture. They may contend that they did this in order to wind up the business, but unless it is conclusively shown to have been done for that purpose in good faith, the estate of C would not be responsible. The estate of the dead man will be bound only by the liability which he was under at his death.

CHAPTER IV

CONDUCT OF THE BUSINESS

1. Power of the Firm to Dispose of its Property; When Insolvent.— When we take up the discussion of the conduct of the business of a firm, we shall find that there are two things to be considered. The first is, the power of the firm to do certain acts, and the second, whether or not the persons signing the contract or conducting the negotiations had the power to act on behalf of the firm. The first question, which we shall dispose of briefly, is as to the power of the firm. Assuming that the firm acts with the consent of all the partners, it has the power to dispose of the property which it owns, and to free that property from any responsibility for the payment of the firm's debt, provided it is solvent at the time of the transaction.

But suppose A, B, and C are partners and the firm is hopelessly insolvent. Discovering this fact, which has not as yet become known to the public, they decide to sell off all their remaining property, pocket the money, and leave the country; which they proceed to do. Suppose they have sold a very valuable building to X, for which X has paid a good price. The firm creditors, finding themselves cheated out of their money, in trying to discover some firm property with which to satisfy their claims, find this building and wish to take it. X objects, saying he is the owner of it, as he

bought it from the firm. The question is, Does that sale stand? In such a case as this one it would not. A firm which is insolvent cannot transfer its property so as to defeat the claims of its creditors.

2. When Solvent. — If, however, the firm at the time of the sale of the property was solvent, that is, if it was at that time fully able to pay its obligations, the sale is good. No creditor can successfully ask to have it set aside. It has been thought that if a firm sold property at a time when it was actually insolvent, but when it honestly believed itself to be solvent, that such a sale would be good. This view, however, is erroneous, since from the standpoint of the creditor it makes no difference whether the firm thought it was solvent or not. The one question which can concern him is whether the firm was in fact able to meet its obligations at the time the property was disposed of.

3. Each Partner the Agent of his Fellows. — We have before indicated that when several individuals enter into the relation of partnership, each one becomes, to some extent at least, the agent of the others, so that if one partner makes a contract or enters into an obligation which purports to bind the firm, this will bind it, unless the partner has done some act which he had no authority to do. It then becomes important to know for what purposes and to what extent each partner is the agent of his fellows. It may be stated that the partner is a general agent, and has power to bind the firm for all acts done in the usual course of the business of the firm, and that no secret limitations of this general agency can affect the rights of third parties.

Each partner has full authority to make simple contracts, which will bind his fellows. It is understood,

however, that these contracts shall be those usually made in the course of the business which the firm is doing. It can readily be seen how impossible it would be to carry on the ordinary business of a partnership, if it were not permissible for each member of it to bind the others for the small business operations which must be conducted every day.

Sometimes a question arises, when a contract has been signed by one who has ceased to be a partner. In such a case, if the notice that he has withdrawn from the firm has not been given to the persons who were accustomed to deal with him, a contract which he makes with them will bind the firm just as much as if he were still a partner. With regard to the question of notice, actual notice must be given to what are known as "prior dealers," that is, to persons who have been accustomed to deal with the firm and with the withdrawing partner. As to those who have not been accustomed to deal with the firm, a notice of the withdrawal by publication is sufficient to protect the remaining members from responsibility for any contracts made by the withdrawing partner after his withdrawal.

4. Sealed Instruments. — Although a partner may make simple contracts on behalf of his firm, it is an absolute rule that he cannot execute a sealed instrument unless he has been given special authority. You have already learned that an agent cannot execute a sealed instrument on behalf of his principal, unless his principal has given him the sealed authority to do so by means of an instrument called a power of attorney. The same rule holds in the case of a partnership. If A, B, and C are partners, and C is to make a sealed contract on behalf of the firm, A and B must execute a power of

attorney to him giving him that authority, or his contract will not bind the firm.

5. Negotiable Contracts. — When we come to the subject of negotiable contracts in this connection, it must be borne in mind that a bill or note is halfway between a sealed contract and a simple contract. As we have learned from our discussion of negotiable contracts, a bill of exchange or a promissory note has a certain value by reason of its form, and when it is in the hands of an innocent third party it does not need to be supported by a consideration: to that extent it resembles a sealed contract.

It will be seen, therefore, that while a partner has power to execute negotiable papers and to bind his firm, his power is limited. When he is acting for the benefit of the firm and is strictly within the scope of the firm business, he may bind his fellows by executing negotiable paper. If, however, one partner signs a promissory note purporting to bind the firm in payment of his individual debt, the presumption is that he has no authority. The separate creditor in such a case cannot recover upon the paper, unless he shows that he had every reason to believe that the paper was given to him for a firm transaction. In the same way, if a paper is executed by a partner, in the firm name, but for his own accommodation, the holder cannot recover unless he proves that he was innocent when he took it. Usually, the burden of proof would be upon the firm to show that he was not innocent, but here the burden of proof is shifted. If the paper is given for a transaction which is clearly in excess of the authority of the partner, then it will not bind. If it is not an excess, but what is known as "abuse" of authority, it is said that it will bind the

firm nevertheless. There is no essential distinction between these two classes of cases. When the court says "excess of authority," it means that the partner has gone outside the business of the firm; when it says "abuse of authority," it means that he has gone too far in carrying out some line which he might legitimately follow.

The only real difference between the power of a partner to execute negotiable paper and his power to execute simple contracts, is that in the former case the courts are much more strict in the interpretation of his power, and call for a greater exercise of good faith by the parties with whom he is dealing.

6. How the Partnership may be Dissolved. — A firm is composed of a certain number of individuals. If the relation existing between them is disturbed, the partnership is at an end. If any one of them dies, or withdraws from the firm, this operates as an instant dissolution. This withdrawal may be effected by a sale of his share in the firm to some third party, or by his insolvency, or by his simple withdrawal. It will also be brought about if he becomes incapacitated from carrying on business because of insanity. It goes without saying that a firm may dissolve itself by the mutual consent of the parties, and it is almost as obvious that the insolvency of the association will bring about the same result. Sometimes, also, the articles of co-partnership, as first drawn up, provide for the termination of the relation at a time specified. The expiration of the time would therefore dissolve the partnership.

SECTION II

CORPORATIONS

CHAPTER I

ESSENTIAL CHARACTERISTICS OF A CORPORATION

1. Distinction between a Corporation and a Partnership.

— We now take up the second form of business association, known as a corporation. A corporation is essentially different from a partnership in two important respects. The first distinction relates to the nature of a corporation itself. We have learned that a partnership is merely an association of individuals, and that it is impossible to consider the partnership existing apart from the persons who are its members. We have also seen that the death of one partner will destroy the partnership.

But what is true of a partnership is not true of a corporation. The corporation has a distinct personality of its own, being a legal person existing separate and distinct from the members who compose it. If you are suing a firm composed of A, B, and C, you are suing three persons, — A, B, and C, trading perhaps as the firm of A, B, C and Company. If a number of individuals form a corporation, called the Pennsylvania

Railroad, and you sue that corporation, you do not sue A, B, C, D, and E, the members of that corporation, but you sue the Pennsylvania Railroad. It has an existence which is entirely distinct from the existence of the individual members.

The second important distinction is one which we shall not discuss at this point, but will take up later, namely, that the individual members of a corporation are not liable personally for the debts contracted by the corporation, as partners are liable for debts contracted by the partnership. When a man purchases stock in a corporation, and thereby becomes a member of it, he risks only the money which he has invested, except in cases where by statute a greater liability has been created.

2. Definition.—A great many different definitions of a corporation have been given. It is not necessary to perplex the student with an enumeration of these technical definitions. Perhaps the best known is the one which was given by Mr. Chief Justice Marshall in the famous Dartmouth College case, when he said, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." This artificial, intangible being, created by individuals who unite together according to law, is endowed with certain attributes by the government under which it is organized. Being not a natural but an artificial person, it has no power to act until such power has been conferred upon it by the sovereignty which created it. The character and the limitations of these powers we will discuss later. What we desire to emphasize here is, that the corporation has a distinct existence, and is what may be called an artificial being.

3. How a Corporation is Created; its Attributes.—It may be seen from this brief discussion that there are certain very great advantages attached to the method of carrying on business by forming a corporation for that purpose. The principal advantage is the fact that the individuals who thus invest their capital risk nothing beyond the actual amount which they put in. Moreover, where a great many persons are interested in the business, it can be conducted much more advantageously by the officers of a corporation than it could be by a partnership, where all have more or less power to act. For these reasons, corporations are multiplying very rapidly all over the country. It is now quite a usual thing for business or manufacturing companies to become incorporated.

In order to establish a corporation it is necessary only for a certain number of individuals, usually five, but sometimes more or less in different states, according to their particular statutes, to organize themselves as an association, and to apply for a charter to the state in which they are seeking incorporation. If the purpose for which they desire incorporation is a lawful one, and one which is sanctioned by the laws of the state where application is made, a charter, which is a certificate of incorporation, will be granted. This charter, or certificate, confers upon the invisible, intangible being created by it, the attributes which are to attach to it and the powers which it is to exercise. It usually confers the right to exist as a corporation; the right to have a name, therein designated; the right to have a corporate seal, which shall be attached to contracts; the right of perpetual succession (that is, the privilege given to each member of the corporation to

sell his interest, usually represented by a certificate of stock, to some other person, without in any way affecting the existence of the corporation itself); and, finally, the right to make by-laws, according to the purpose for which the charter is granted.

4. Organization of a Corporation. — When applying for a charter, the applicants must state that they have organized themselves into a company with the intention of exercising the privileges to be conferred upon them by the charter. This association is governed by officers who are elected for that purpose. The governing board is usually composed of officers called directors; in addition to the board of directors there are such officers as president, secretary, treasurer, etc. The stockholders (who are the persons forming the corporation), as such, have no direct voice in the management of the business. As we shall see, they have the right to vote for the officers, but their power stops at that point. Here, again, we see a very essential distinction between a corporation and a partnership. Each partner has not only the right to act on his own behalf, but also on the part of his fellows. A stockholder of a corporation has not even the right to act directly on his own behalf. He can do little except indicate whom he wishes to hold the offices to which the power to act is attached.

5. Power of the Corporation. — The charter which confers corporate life upon the intangible being, also confers upon it its capacity to act. If the individuals who have organized a corporation apply for a charter for the purpose of carrying on a manufacturing business, the charter confers upon the corporation the power to manufacture. If they apply for a charter for the pur-

pose of carrying on the business of wholesale dry goods merchants, the corporation is given the power to carry on that kind of business. If they apply for a charter to operate a railroad, the corporation may operate a railroad; but in no one of these cases has it the power to make any contract or do any act whatever not in the furtherance of the purpose for which it was organized.

We shall hereafter deal with the effect of a corporation overstepping the bounds laid down for it in the charter. The point we desire to emphasize here is that this artificial person created by the charter does not have all the power of a natural person, but only the powers pertaining to the business for which it has been created, including the power to contract, to borrow money, and to do any act ordinarily necessary for carrying on the particular business in which it is engaged. If a corporation organized for the purpose of operating a railroad, speculates in land or engages in the wholesale fruit business, it has gone beyond its power and has violated the terms of its charter.

6. Perpetual Succession. — We have briefly referred to that attribute of a corporation which is known as perpetual succession. When a corporation is organized, those who are members of it, and who have invested their money for the purpose of carrying on the business, are said to own the stock of the corporation. Carrying out further the idea of an artificial person, the corporation itself issues a certain number of shares of stock; the individual members then purchase this stock, and pay the money into the treasury of the corporation. The corporation then uses the money in carrying on the business. The members holding the stock are called stockholders. Ownership of stock conveys certain

rights and liabilities; which we will discuss in the proper place. Among them is the privilege of selling the stock to other persons if they choose to do so. This is what is done in the stock exchanges of all the great cities of the country, where hundreds of thousands of dollars' worth of stock changes hands daily. The purchaser becomes a member of the corporation, by virtue of the fact that he has bought the stock. If a stockholder dies, his personal representative becomes a member of the corporation, because the stock has come to him in his capacity as a personal representative of the deceased. This is another particular in which corporations differ completely from partnerships.

7. Citizenship. — Necessarily, when shares of stock are continually changing hands, members of the corporation live in different parts of the country. Suppose a corporation to have been organized in the state of Pennsylvania. Subsequently the stock, after having passed through the hands of different purchasers, all comes into the hands of people who live in the states of New York, New Jersey, and other states, and none of whom live in Pennsylvania. The question then might arise as to where the corporation is a citizen. Would it be a citizen of the state where it was organized, or would it be a citizen of the state where the majority of its stockholders live? It would be a citizen of the state where its charter was granted. Even though every member of it may be a resident and citizen of another state, and even of another country, that does not change the citizenship of the artificial person. Its citizenship is fixed by its charter.

A. Shares of Stock are Personal Property. — In discussing partnership, we saw that each partner's share was

treated as personal property as long as the firm was carrying on business, but that it was treated as real property at the death of a partner, if the property which it represented was real property. Suppose a corporation is doing a land business, and has no property except real estate. You are the owner of a large number of shares of stock. Are you the owner of real estate, or are you the owner of personal property? If you should die, would your shares of stock go to your heir, or would they go to your personal representative? They would go to your personal representative, as shares of stock are not real property, but always personal property, no matter what may be the character of the property owned by the corporation. A share of stock merely represents certain rights which a stockholder has. It does not represent a share in any property owned by the corporation itself.

8. How a Corporation may be Dissolved.— Having seen how a corporation may be created, we now ask how it may be destroyed. There are five ways in which a corporation may come to an end. In the first place, its charter may have been granted for a limited time, say fifty years; at the end of that period the corporation dies a natural death. Secondly, the charter may be repealed by the legislature of the state which granted it, if the original charter contains a clause, which most modern charters do, providing that it may be repealed at any time. Thirdly, the charter may be surrendered voluntarily by the corporation, with the consent of the state, or it may be forfeited for some wrongful act which has been done by the corporation and for which it has been called to account by the attorney-general of the state. This forfeiture would have to be brought

about by the decision of a court. Lastly, it is generally considered that if all the members of a corporation die, so that there are no stockholders left, it then ceases to exist. This view of the case is a little hard to understand when we remember that the corporation is entirely distinct from its members, but nevertheless such is the law.

CHAPTER II

LIABILITY OF STOCKHOLDERS OF A CORPORATION REGULARLY ORGANIZED

1. Liabilities of Subscribers to Stock. — When a man purchases stock he thereby becomes a member of the corporation. If he has not purchased outright, but has only agreed to subscribe, he has then made a contract by which he is obliged to pay for the stock and accept it according to his agreement. Suppose, however, that at the time he subscribed to the stock, the corporation was not in existence. Suppose A, B, and C are attempting to organize a corporation for the purpose of carrying on a manufacturing business. They wish to raise a sufficient amount of capital to start. In order to do so, it is necessary to get a number of moneyed men to subscribe to the stock of the new corporation; by so doing they agree to pay the par value of the stock into the coffers of the artificial person, so that it may begin business. Will such a contract bind?

Suppose A came to you and induced you to subscribe to ten thousand dollars' worth of stock. The corporation is afterwards organized, and you are offered your shares of stock and invited to pay your money. You have, however, reconsidered your determination, and refuse to do so. It may be argued that the corporation cannot force you to pay, because at the time you made your contract the corporation did not exist; therefore,

there is no binding contract, because you could not have made a contract with a being not then in existence. This argument was at one time accorded some consideration, but it has now been abandoned. If you subscribe to the stock of a corporation, and agree to accept and pay for it at a particular time, you will have to live up to your contract, even though the corporation was not in existence when the agreement was made. Perhaps the best theory upon which this view of the case is justified is, that you have made an offer to purchase stock, which offer is to remain open until a corporation is organized, and you are bound by your agreement with the promoters not to withdraw it. As soon as the corporation is organized, that constitutes an acceptance of the offer which you have made. You cannot afterwards retract, consequently you are bound. Whether we can theoretically justify the conclusion or not, it is universally sound law that such a subscription will bind.

2. Conditional Subscriptions. — Sometimes a man subscribes to the stock of a corporation only conditionally. A was the owner of a farm, and was very anxious to have a railroad run across it, as he had a great deal of produce to ship to the city. He subscribed ten thousand dollars to the stock of a certain railroad, on condition that a station should be put on the corner of his farm, which condition was agreed to by the organizers of the company. The railroad was built, but it did not come within two miles of the farm of the subscriber, and of course no station was erected on his land. He refused to accept and pay for the stock. The question was whether he could be compelled to do so. In most states in this country he would not be compelled to pay, under those circumstances.

There is a strong argument which could be made, however, against such a rule, by saying it is a fraud toward the other stockholders for a man to subscribe to stock with a secret condition attached to his subscription. Other men would see his name on the subscription books, and they might agree to purchase stock because of the additional security which was offered by reason of his being one of the promoters. The argument then says that it would not be right to allow him to withdraw on account of the non-fulfillment of the condition, which did not appear upon the subscription book, and which was known only to him and the men with whom he had contracted.

On the other hand, it does not seem fair to force a man to subscribe to stock, when his only reason for subscribing in the first place was the hope of getting a station upon his land—in which he has been disappointed. If the condition is of such a nature that the court thinks it was intended to deceive the public, then, in all states, the subscriber would be compelled to pay, even if the conditions were not fulfilled. But where the condition is such a one as indicated, the subscriber would be excused from his subscription in nearly all the states. In Pennsylvania he would probably have to pay, under any conditions, but that view of the law is perhaps erroneous. It is certainly not approved in other jurisdictions.

3. Liability of Stockholders limited to Capital Invested. — As previously indicated, the stockholder of a corporation risks only the capital which he invests. If he pays ten thousand dollars into the coffers of the corporation, in return for which he gets ten thousand dollars' worth of stock, he has embarked ten thousand

dollars in business. If the business of the corporation prospers, he will, no doubt, receive dividends upon his stock, that is, he will receive his share of the profits. If the business of the corporation is a disastrous failure he loses his ten thousand dollars, but the creditors cannot come upon his property for the payment of their obligations. In that respect he is in a much better situation than a partner. That is the reason why so many enterprises, both small and large, prefer to become incorporated rather than to risk the whole fortunes of their members by conducting their business on a partnership basis.

4. Stockholder Bound to pay for his Stock in Full. — We will now assume that a corporation has been regularly organized and is doing business, and that A is an original subscriber to the stock. Suppose that the promoters of the company have had some difficulty in getting the requisite amount of capital, — as often happens when a new company is being launched, — and, in order to gain support, they have been offering to sell stock at twenty-five per cent. of its face value. That is, although the purchaser receives ten thousand dollars' worth of stock, he pays for it only twenty-five hundred dollars. Upon this stock he is entitled to receive dividends as if he had paid the full amount; and upon the books of the company it would appear that he had paid the full amount, and the treasury of the corporation would appear to be in much better condition than it really is.

In such a case, suppose X, after an examination of the books, loans a large sum of money to the corporation. Business is bad, and the money is not repaid. X investigates, and finds out that A, who purchased on the terms mentioned, has never paid in the full value of his stock.

He may then force him to do so, in order that the money shall be applied to the payment of the debts of the corporation.

When a man subscribes to the stock of a company which is being organized, he agrees that the amount of the face value of the stock which stands in his name shall be used for the payment of the liabilities of the new company. No agreement which he may have made with the corporation itself will excuse him from actually paying that money into the treasury for the benefit of the creditors. He is considered by the courts to be in the same position as if he held an amount of money equal to the face value of the stock, as trustee for the benefit of creditors who have loaned money to the corporation, relying upon the apparent amount of funds in the treasury. If this particular creditor had loaned money to the corporation before A had subscribed to the stock, he could not force A to pay, because he would not be deceived under those circumstances, or in any way injured by A's secret contract. As long as the rights of creditors did not intervene, the contract, as originally made, would stand.

CHAPTER III

LIABILITY OF STOCKHOLDERS OF AN IRREGULAR CORPORATION

1. When a Creditor Seeks to hold Stockholders as Partners.

— Sometimes the individuals who have banded together for the purpose of forming a corporation, do not properly conform to all the legal requirements. Some state laws provide that a corporation shall not come into existence until three fourths of the face value of its stock shall have been paid into the treasury in cash. Suppose that in a particular case only one fourth of this amount has been paid in, but that the corporation begins business in spite of that fact. Under such circumstances the corporation was never regularly formed at all. According to the state law it cannot come into existence until the stipulated amount has been paid in. Under such conditions, suppose you have lent a large sum of money to this irregularly formed corporation. You fail to recover the amount of your debt from the corporation, because there are not enough funds in the treasury. You discover that the corporation was never regularly formed, and you seek to hold the stockholders personally responsible for the payment of your claim, upon the theory that as they have been trading together, sharing profits, etc., and as they have never secured corporate immunity as stockholders, for the reason that no corporation was ever formed, therefore they must be

partners, and you have the right to recover against them as such.

2. De Facto Corporations. — If there really was no attempt at creating a corporation made in good faith, then this argument might be allowed by the court. In most cases, however, — certainly in the case we have just mentioned, — the attempt to form a corporation would not result in forming a partnership, but would form what is known as a “de facto” corporation. The “de facto” corporation is an association which has been formed by a group of individuals who started out with the intention of forming a regular corporation. It must appear that they were honest in their efforts to become incorporated, that there was a valid law under which they might have become incorporated if they had properly conformed to it, and that they have really organized themselves and have carried on business as a corporation. If all these elements combine, and we have what is known as a “de facto” corporation, then the stockholders cannot be charged as partners.

It is said that the failure to conform to the law injures no one except the state. The state makes certain stipulations which must be conformed to before the corporation is formed. If these requirements are not conformed to, it is the state that is injured, and therefore the state has the right to complain (acting through its attorney-general), and to take away the charter of the corporation if it sees fit. But if some third party has dealt with the company, believing it to be a corporation, and relying upon its corporate credit and not upon the individual liabilities of its members, he is not allowed to come into court and say that he did not deal with a corporation, but with a

partnership. As he has made a contract with a corporation, he cannot now pretend that he thought it to be a partnership. He is not injured by the fact that the corporation was irregularly formed, but by the circumstance that the treasury was empty.

3. "One Man" Companies. — It often happens that a man who is carrying on a hazardous business desires to have his business incorporated, for the purpose of securing immunity from personal liability in case his business turns out to be disastrous. A, in order to conform literally to the law, associated with himself his wife, two of his children, and his brother, in order to make the necessary five persons, and then applied for a charter in the regular manner, and became incorporated for the purpose of carrying on the same business which he formerly carried on alone. This corporation, as you can see, was really formed of only one individual, viz., A. He was the only one who was the *bona fide* owner of stock; he was the only one who had anything to do with the business; he himself probably filled all the offices.

The pretended corporation became insolvent, and the creditors sought to hold A personally responsible for the payment of their debts. A claimed immunity on the ground that he was only a stockholder in the corporation. There has been some conflict of authority as to what would be the result reached in similar cases. It is apparent that A literally conformed to the requirements of the statute. Five individuals associated themselves together, and formed a corporation according to law. How, then, is it possible to go back of this apparently regular corporation and charge A personally? American courts take the view that the act of legislature, when it says five persons must associate together to

form a corporation, means that there must be five *bona fide* stockholders, and that if one man associates with him other members of his family, or other persons who are not really interested, but who join with him only for the purpose of furthering his private ends, the act has not been conformed to. In this instance five *bona fide* men had not associated themselves together, but one man and four individuals who were mere cat's-paws, termed "straw" men; therefore A could be held personally responsible for the payment of the debts of the corporation, as he was in the case given.

CHAPTER IV

RIGHTS OF STOCKHOLDERS

1. **The Right to Vote.** — One of the essential distinctions between the corporation and the partnership is, that while the partner has an almost unlimited power to control the business, the stockholder's power is restricted almost to the right to vote. He has certain limited rights to restrain the management of the business, which we will discuss in the next paragraph, but the principal right which he has in respect to the business of the corporation, is the right to vote.

Every stockholder has the right to vote, as a necessary incident of his ownership of stock. This includes, first, the right to elect officers, and, second, the right to vote for certain fundamental principles which are thereby embodied in the constitution and by-laws of the company; and sometimes he may assist in deciding upon the general policy upon which the business is to be conducted. This right to vote may be delegated to some one else temporarily if the charter and by-laws of the corporation permit it. The person to whom the right to vote is temporarily given, and who votes instead of the stockholder, is called the "proxy."

This is a very important matter, because often, in order to facilitate the business of a great corporation, the stockholders will give their votes to one "proxy"

or to a small committee who, therefore, have the entire management of the business within their control. This committee to whom the entire voting power is given is called a "voting trust." It was formerly questioned whether it was permissible for all the voting power of a corporation to be given to two or three individuals in this manner. It has, however, been decided that it is not illegal, and may be done for a proper purpose.

No agreement, however, which a stockholder may make, in reference to giving his power to vote to a proxy, can prevent him from withdrawing that power at will. These "voting trusts" are organized very often when it is particularly desirable to commit the corporation definitely to a certain line of action. Particularly is this true in cases where a number of corporations wish to combine in the form of monopolies, or, as they are called, trusts. Almost the first step necessary to accomplish this is to get the voting power of all the corporations concerned, into the hands of two or three men, who will then run all the corporations in the interests of the trust. A voting trust formed for such purposes as that would probably be declared illegal.

2. Rights with Respect to Management. — With respect to the actual management of the business, the stockholder has very little to do. The active management is conducted by the directors, assisted by the president, secretary, treasurer, etc., who are regularly elected officers of the corporation. If a stockholder has reason to believe that the directors are conducting the management in a manner detrimental to his interest, he may have access to the books by obtaining the proper authority from the court, provided he alleges his specific reason for wishing to review them.

If the directors are doing acts which are beyond the power of the corporation, a stockholder may file a bill in equity to restrain them. If he were not allowed to do this, the directors might proceed to perform these acts and subject the charter to the liability of forfeiture, which would be an irreparable injury to the stockholder.

In the same way, if the directors are acting in a fraudulent manner, — for instance, if they are paying themselves enormous salaries so as to use up the profits and leave no dividends for the stockholder, and the latter is unable, for some reason, to have the directors put out of office, he may file a bill in equity to restrain them from conducting the business in this improper manner. The stockholder also has an inalienable right to maintain the corporation for the purpose for which it was originally organized. Even if he is of the minority, if he purchases stock in a corporation which is doing the business of running a railroad, and the majority of the members of the corporation desire to procure a new charter, and to engage also in the business of running steamboats, he may prevent them from doing this by a bill in equity. Further than this, the stockholder's rights are very limited, — he has no active control over the business.

3. Right to receive Dividends. — The principal benefit which the stockholder gets is his right to draw dividends. The term "dividends" is used instead of profits. Whenever the business of the corporation has resulted in a net profit over and above the running expenses, etc., and this profit has reached a sufficient size to warrant its distribution among the various stockholders, the company, through its directors, declares a dividend. These officers ascertain by simple calcula-

tion what percentage of the face value of the stock can be paid out as profit to all the stockholders; they then make a formal statement to that effect, and pay dividends to all stockholders, according to the amount of stock which each holds.

In many corporations there are two classes of stock, known as common stock and preferred stock. If you are a holder of preferred stock, you are entitled to receive a dividend up to a certain percentage, which is indicated in the certificate of stock, before the holders of common stock get any dividends at all. The preferred stock is therefore apt to sell at a higher figure than the common stock.

Sometimes the business has been profitable, but the directors, for some reason, do not see fit to declare a dividend. If, in such a case, the stockholders feel aggrieved because no dividends have been declared, have they any means of forcing the directors to declare a dividend? In a court of equity at the present day, a stockholder may file a bill to force the directors to declare a dividend, if it clearly appears that they are improperly holding back the net profits. Some courts take the view that as directors have a very large discretionary power, they cannot be forced to declare a dividend unless there has been bad faith on their part. Others say that if the directors have no reasonable ground for not declaring a dividend, they are bound to do it. If the directors are about to declare dividends illegally, they may be restrained by the stockholders; but, as a rule, the entire management of this question is left in their hands.

4. Right to Share in the Surplus remaining after the Corporation is Dissolved.—The stockholders also have a

right to the property owned by the corporation, after the latter has ceased to exist. As we have pointed out, while the corporation is in existence the property is not owned by the stockholders, but by the corporation itself. It was formerly thought that when the corporation ceased to exist, this property would revert to the state. This view, however, has now been abandoned; and it is well settled that if the corporation has ceased to exist in any of the ways enumerated above, and its debts have been paid in full, then the surplus remaining should be distributed to the stockholders, in proportion to the face value of the stock which each holds.

5. Transfer of Shares of Stock. — A stockholder's right in a corporation, as represented by his certificate of stock, is personal property. It may be bought and sold just like personal property, as we have already explained. We have not, however, indicated the manner in which these transfers may take place. Not only has the stockholder a certificate of stock to represent his claim, but his name is recorded upon the books of the company as the legal owner of the stock. Provision is usually made by all corporations that no person shall be recognized as a stockholder of the company, or be entitled to dividends, or the right to vote, until his name has been properly entered upon the company's books.

Suppose you are the owner of a certificate of stock which you desire to sell to me. You transfer it to me, but do not have the transfer recorded upon the books of the company. You are still the legal owner of the stock; if any dividends are to be paid, they will be paid to you. It is true that inasmuch as I am the real owner of the stock, I may perhaps succeed in forcing you to pay this dividend over to me; but the point is,

you are still the owner until my name has been recorded upon the books of the company.

It may be objected that this would be unjust, in that you may not see fit to order the company to change the name. That, however, is a minor consideration. If you have transferred your certificate of stock to me, I may go to the company and present it to its officers, and they will transfer the stock to my name without any action on your part. If they refuse to do so, I may file a bill in equity and force them to do so. But not until that is done am I the legal owner of the stock.

The officers cannot, for any reasons of their own, refuse to record the purchaser upon the books of the company. A had made himself very obnoxious to the Standard Oil Company by writing a pamphlet in which he savagely attacked their methods. Subsequently, when he had purchased some stock of that corporation, its officers refused to record his name as legal owner. He applied to a court of equity and forced them to do so.

CHAPTER V

LIABILITY OF A CORPORATION

1. Liability of a Corporation for its Contracts. — A corporation, as such, is responsible for all obligations into which it enters, provided the contract or obligation is undertaken in the proper manner, and is within the power conferred upon the corporation by its charter. The principal contracts made by a corporation should be signed by its officers and sealed with the corporate seal. It was formerly thought that all contracts of the corporation had to be sealed in this manner, in order to be binding.

The theory was, that the only way in which the corporation could contract was by means of its common seal; that inasmuch as it had no personality, or only a fictitious personality, it could not make a contract by word of mouth because it had no tongue with which to speak. This was an absurd argument, however, for, as was pointed out by one of the judges before whom this view of the case was urged, although a corporation has no tongue with which to speak, neither has it a hand with which to write; and if you take the view that it cannot make a contract by word of mouth because it has no tongue, neither can it make a written contract, because it has no hand with which to sign or to affix the seal.

It is now well settled that minor contracts do not have to be sealed. If it were necessary to affix the corporate seal to every contract that was made with the myriads of

workmen who are employed by a great railroad, or for each one of the thousands of little contracts which must be made, it would give rise to endless trouble. Such contracts may be made by the proper officers of the corporation, practically in the same manner that any individual may make a contract. The only difference is that the corporation is incapable of making a contract itself, either orally or in writing, but must always do it through its agents.

2. Liability for Contracts of Promoters. — Sometimes individuals who are attempting to organize a corporation, will make promises on behalf of the corporation when it has not yet come into existence. The question is, Will such contracts bind the corporation after it has become organized? Suppose A, B, and C are promoters of a mining company; they make a proposition to X to the effect that if he will secure subscriptions to one hundred thousand dollars' worth of stock, the company will pay him ten thousand dollars. X spends a great deal of time and money in getting the necessary subscriptions, and, after the company is organized, asks for his money, but is refused. He brings suit against the corporation. The corporation defends itself by saying, that as it was not in existence at the time this agreement was entered into, no contract was ever made; that he could not have made a contract with a principal who did not exist, even though he had dealt with one who pretended to be an agent.

This, of course, is true, but at the same time it seems very unjust to say that in such a case as this X could not recover. The argument given, however, is theoretically correct, and if X attempted to rely upon his contract, he probably would not be allowed to recover.

In such a case, however, he would be allowed to recover, not on the principle of contracts, but on the principle of "quasi contracts." Without going into the discussion of what we mean by quasi contracts at this point, it is sufficient to say that if one man has conferred some benefit upon another at his request, even though there was no contract between them, the second person is bound to pay what the benefit is reasonably worth. X certainly has conferred the greatest possible benefit upon the corporation, because if it had not been for his services in securing the subscriptions to the stock, the corporation, possibly, never could have come into existence at all. It may be objected that the corporation did not request X to confer these benefits upon it and had no opportunity to express its desire either to accept or refuse them; but the answer to this is, that the corporation could not have refused to accept them, for to have done so would have been ruinous, inasmuch as the benefits were absolutely necessary to its corporate existence. Upon this theory, X would be permitted to recover. In some states, if the corporation, after becoming fully organized, passes a vote by which it adopts or ratifies a contract made on its behalf by the promoters, that contract will bind. This view, while theoretically faulty, works substantial justice.

3. Liability of Corporation irregularly Organized. — We have referred above to a corporation which has failed to become properly organized by reason of its non-conformity to the law. We have seen that in such a case a contracting party cannot charge the stockholders, as partners. Suppose, however, a corporation is sued by a person who has made a contract with it, and it seeks to escape liability by saying that it was not properly

organized, and is really not a corporation at all, and, consequently, never could be liable on a contract. It is only necessary to state this proposition to see how absurd it would be for the courts to entertain it. If a corporation has traded as a corporation, has contracted as a corporation, has led innocent parties to believe that it is a corporation, it cannot now, while being sued upon these contractual obligations into which it has entered, escape liability by saying that it never was a corporation at all. The court will not allow it to say this. It is said to be "estopped" from saying it.

4. *Liability for Ultra Vires Acts.* — We have before referred to the fact that the power of a corporation is limited. But if it has done an act which it has no power to do, does that subject it to any liability? If so, how great a liability? This question is involved in a great deal of difficulty, and a detailed discussion would lead us into an argument entirely inappropriate in a book of this character. It is sufficient to state that in American courts, if a contract has been made which is clearly beyond the power of the corporation to make, and neither party has performed his part, such a contract is void, and no rights are thereby acquired by either over the other.

If, however, one of the parties has fully performed his part of the contract and has conferred a substantial benefit upon the other, he usually is allowed to recover, whether he is the individual or the corporation. Some courts treat the contract as being binding, although illegal. Others treat it as void, but allow the plaintiff to recover on the theory of "quasi contract," to which we have referred in the preceding paragraph. In either event, the fact that the corporation has made a contract

beyond the scope of its authority subjects it to the liability of having its charter forfeited.

5. Liability for Torts.— We have learned that contracts which are made by the agents of a corporation on its behalf, will bind it, just as contracts made by an agent on behalf of an individual will bind him. Similarly, torts committed by the agents of a corporation subject it to liability in much the same manner as do torts of the agents of natural persons. It was formerly thought that a corporation could not be held responsible for a tort, like deceit, involving some moral wrong, the theory being that the corporation could not do anything morally wrong because it was only an artificial person, and consequently was incapable of wrong intentions. That view of the case has been abandoned. It is founded upon the same foolish idea that the corporation is responsible only for those things it can do itself. The only exception to the rule that corporations are responsible for the torts of their agents, is in the case of charitable corporations. A hospital, for instance, would not be responsible for the wrongful acts of its servants. This rule is based partly upon theoretical considerations, but mostly upon grounds of public policy.

6. Liability for Crimes of its Agents.— Manifestly a corporation cannot commit crime, but it may be responsible for the criminal acts of its agent to the same extent that an individual may be responsible for the criminal acts of his agent. We have seen that the publisher of a newspaper may be criminally responsible for libel appearing in it. If the publisher is a corporation, that corporation may be responsible in the same manner.

CHAPTER VI

RELATION OF A CORPORATION TO THE STATE

1. *Ultra Vires Acts.* — We have elsewhere referred to the fact that the state has a more or less direct control over the corporations which it charters. It grants to them certain powers, and impliedly forbids the exercise or the attempt to exercise any powers not specifically granted to them. If they have gone beyond the limits, the attorney-general of the state may begin proceedings against them in the courts; and if it be proven that they have done acts which they have no power to do, their charters may be forfeited.

2. *Illegal Acts.* — It goes without saying that a corporation is impliedly forbidden to do any illegal act. Any act beyond its authority is known as an *ultra vires* act. Any act which at common law would be illegal, even if performed by a private person, would not only be beyond the power of the corporation, but would also be an actual infringement of the law. The most common act of this character of which corporations are guilty is an illegal combination to create a monopoly, or a trust. Corporations often enter into agreements among themselves, by which they provide that they will charge certain prices, that they will not compete with each other in certain districts, that they will regulate the price of raw material, etc.

These combinations are of such a nature that an immense power is placed in the hands of the combined capital and other resources of the different organizations. It is a power which many statesmen deem extremely dangerous to the welfare of the community. Whether this is actually true or not cannot be determined in our present knowledge of the subject. But if such a formation is made with the deliberate object of creating a monopoly, it is contrary to the common law, and therefore is illegal. If a corporation enters into such a contract, it has subjected itself to the liability of punishment by forfeiture of its charter; and more than one corporation has come to grief in this manner. The full discussion of this subject belongs perhaps more properly to political economy, or to legal treatises which go much more deeply into the subject than we can.

SECTION III

LIMITED PARTNERSHIPS AND JOINT-STOCK COMPANIES

CHAPTER I

LIMITED PARTNERSHIPS

1. Distinction between Limited Partnerships and Corporations. — Before leaving the subject of business associations, we will briefly discuss some hybrid organizations which stand midway between a partnership and a corporation. One of these is called a limited partnership. This limited partnership can be formed only when a special act of the legislature of the state in which the parties are proposing to do business provides for it. It differs from an ordinary partnership in that one or more of the partners may invest their capital in the business, without becoming personally liable for the debts of the firm. It differs from a corporation in that there are no shares of stock, there is no corporate organization, and some of the individuals are general partners, and are personally responsible as such.

2. General and Special Partners. — When the parties desire to organize a limited partnership, they are compelled to go through certain formalities, which, as a rule, are even more stringent than the formalities for

the organization of a corporation. The limited partnership is composed of general and special partners. The general partners have active control of the business, and their liability does not differ from the liability of ordinary partners. The special partners invest capital in the business, but have no active control over it, and are liable only to the extent of the capital invested.

In order that this immunity may be conferred upon a special partner, however, it is absolutely necessary that all the stipulated regulations shall be conformed to by the parties forming the association. These regulations are, usually, that the parties shall file a statement in a book kept for that purpose in the court house of the county where the partnership is to do business, giving the names of the general partners and the special partners, the character of the business they intend to carry on, the amount of the capital invested by the special partners, etc. They are then compelled to publish the firm name in such a way that the public may know who are general and who are special partners.

3. Effect of Failure to Conform to the Statutory Rules. —

We have seen that the stockholders of an irregularly formed corporation cannot be charged as partners. Just the reverse is true in the case we are now discussing. A limited partnership is not a corporation. Its members do not have immunity, except as such immunity is conferred upon them by reason of their compliance with the statutes. If they fail to comply they are partners, and the special partner is just as responsible as a general partner. Consequently, if at any time you wish to invest your capital in this way, it is to your interest to see that every single particular required by the law has been complied with.

CHAPTER II

PARTNERSHIP ASSOCIATIONS OR JOINT-STOCK COMPANIES

1. Distinction between Joint-stock Company and Limited Partnership.—The other form of business association which is similar to, and yet different from, the corporation or the partnership, is what is known as a partnership association, or joint-stock company. This form of association is also often called a "limited partnership." The name differs in different states. This also is an association created by statutory law, and does not exist at common law. A joint-stock company is more nearly like a corporation than it is like a partnership. Its members usually hold shares of stock to represent their claims to a share in the business. The active management of the concern is carried on by officers who are elected very much as officers are elected in a corporation, and the members are responsible only for the amount of the stock which they have contributed. The character of the joint-stock company, and, indeed, of the limited partnership, varies in the different states by reason of the fact that these associations exist only by virtue of particular state statutes. In most of them, however, the general features of the joint-stock companies are as we have indicated. In the state of Pennsylvania, a very recent act has been passed which creates a kind of joint-stock company which is almost exactly like a corporation, except in the one circumstance that it has much greater powers.

2. Statutory Requirements. — This form of association, which, it should be repeated, is often called a limited partnership, must also be formed in a particular manner, or the persons associating themselves together succeed only in forming a general partnership. The names of the members, the capital invested by each, etc., must be recorded, as in the case of limited partnerships, and, in addition, the word “limited” must, as a rule, be added to the name of the firm which is exhibited at the place of business. This word “limited” is for the purpose of notifying the public that the members are not under an absolute liability to the creditors of the association.

3. Effect of Failure to Conform to the Statutory Requirements. — It should be remembered that business associations are divided into two types, partnerships and corporations. If the association is a corporation, then, *prima facie*, its members are not liable for the debts of the association. If it be a partnership, however, they are, *prima facie*, liable, unless they are relieved from that liability by some particular rule of law. Inasmuch as limited partnerships and joint-stock companies are not corporations, they are therefore partnerships, upon the members of which the law has conferred immunity from personal liability. The result is, that in the case of a joint-stock company, just as in the case of a limited partnership, if the parties fail properly to organize, so that they have not formed a stock company, the members are individually liable. The law will treat them as partners, unless by exact conformity to the requirements of the statute they have brought themselves within the immunity which is offered by its terms.



DEFINITIONS

Acceptance : The writing of the drawee upon a bill of exchange by which he agrees to pay it.

Acceptance for Honor : Acceptance, for the protection of the drawer, by a person other than the drawee.

Acceptor : One to whom a bill of exchange is directed and who agrees to pay it at maturity.

Accommodation Indorser : One who indorses a note without consideration, to enable another to raise money upon it.

Action : A suit at law.

Administrator : A person appointed by the court to settle the affairs and distribute, according to law, the property of one who has died intestate (without making a will).

Agent : One who acts for another, called his principal.

Anomalous Indorsement : Indorsement by a person who is not the owner of a promissory note or bill of exchange.

Assets : All the valuable property belonging to an individual, a corporation, or a partnership.

Assignee : One to whom an assignment has been made.

Assignment : A transfer of rights by one person to another.

Assignor : One who makes an assignment.

Assigns : Persons to whom an assignment has been made.

Bailee : One who makes a contract for the temporary possession of property belonging to another.

Bailment : Contract by which property of one person is temporarily placed in the possession of another, with a *proviso* for its return.

Bailor : One who makes a contract for the bailment of property to another.

Bankrupt : One who has done some act indicating his inability to pay his debts.

Bankruptcy : Inability of a person to pay his debts.

Barter : The exchange of one piece of property for another piece of property.

Bill of Exchange : A written order from one person to another, directing the one to whom it is addressed to pay to a third person a sum of money named therein.

Bill in Equity : A petition addressed to a court of equity, setting forth some injury which has been received by the complainant, and asking for redress.

Bona fide : In good faith, done with perfect honesty of intention.

Carrier : One who transports persons or goods.

Caveat Emptor : Let the buyer beware.

Caveat Venditor : Let the seller beware.

Cestui Que Trust : One for whose benefit property is held by a trustee.

Chattel : An object of personal property.

Check : A written order addressed to a bank by a person having funds deposited therein, requesting the bank to pay to some one named in the check a definite sum of money.

Civil Law : The body of law originally derived from the Romans, and now generally in force in Continental Europe.

Collateral Security : A separate obligation attached to another contract to guarantee its performance.

Common Law : A body of rules handed down in England from time immemorial, to govern the relations of men in ordinary civil affairs.

Consideration : Anything of legal value which is given by one person to another for the making of a promise.

Consignee : One to whom goods are shipped.

Consignor : One who ships goods to another.

Co-owner : One who owns property jointly with another.

Co-proprietors : Persons who are joint owners of property and act together in its management.

Corporation : An artificial person created by an act of legislature.

Court of Equity : A court which administers justice according to the principles of equity.

Court of Law : A court which administers justice according to the Common Law.

Covenant : An agreement contained in a deed.

Crime : Violation of public rights.

Deed : A sealed contract for the transfer of property.

De facto : As a matter of fact.

Default : Non-performance of duty.

Defendant : One against whom a suit at law is brought.

Delivery : The transfer of the possession of an article to another person.

Digest : A compilation arranged in an orderly manner.

Doctrine of Marshalling : A rule of law which provides that if a creditor has a claim upon two funds for the payment of his debt, he must use the fund against which there are no other claims, before he is allowed to take that which is also responsible for the payment of other debts than his own.

Drawer : One who draws a bill of exchange.

Duress : Actual or threatened violence.

Embezzle : To appropriate to one's own use, money of another temporarily in one's possession.

Escrow : Safe-keeping — applied to deeds which are retained for future delivery to the person named in the deed.

Estoppel : A rule of law by which one is forbidden to assert a fact which he has previously denied, either by his conduct or by his words.

Executor : A person named in a will, to carry out its provisions, or a person appointed by the court for the same purpose.

Executory : To be performed in the future.

Factor : A commission merchant, — a person entrusted by another with the latter's goods for the purpose of sale.

Fraud : The unlawful appropriation of another's property by means of false representations or deceptive acts.

Guaranty : An engagement to pay the debt of another, upon his failure to do so.

Guardian : One appointed to take charge of the person or property of another, or both, by reason of some disability of the latter, such as minority, lunacy, or feeble-mindedness.

Indorsee : One to whom an indorsement is made.

Indorsement : A writing on the back of a promissory note or bill of exchange, by the owner thereof, for the purpose of transferring it to another party.

Indorsement in blank : An indorsement in which the name of the indorsee is omitted.

Indorsement in full: An indorsement to a definite person.

Indorsement without recourse: Method of indorsement by which the indorser passes title without rendering himself responsible for the payment of the instrument.

Indorser: One who indorses.

Infant: Any person under the legal age of majority, usually fixed at twenty-one years.

Insolvency: Inability to pay debts.

Insolvent: One who is unable to pay his debts, — state of being unable to pay one's debts.

International Law: The customs and usages observed by nations in their intercourse with one another.

Intestate: One who, having lawful power to make a will, has made none, — the state of one who dies without a will.

Joint-Stock Companies: Partnerships in which the liability of members for firm debts is limited to the amount of their investment.

Lease: A contract for the use of property and its return to the owner.

Legal Tender: The money which one is bound by law to accept in legal satisfaction of a debt.

Lien: A claim which one person has upon the property of another as security for some debt owed by the latter to the former.

Liquidated Damages: Sums of money agreed to be paid by parties to a contract in case of its breach.

Litigation: A contest in a court of justice, for the purpose of enforcing a right.

Maker: One who has made a promise in a promissory note.

Merger: The dissolution of one contract by the formation of another having superior legal force, relating to the same subject-matter.

Misrepresentation: An unwittingly false statement about the subject-matter of a contract.

Mistake: An error as to a material fact involved in a contract.

Municipal Law: Body of law which governs the civil actions of the resident of a nation.

Negotiable Paper: Contracts to pay money, which, by their nature, are freely transferable from hand to hand.

Negotiate: To transfer negotiable paper from one party to another.

Nominal Partner: A person who, though not really, is apparently a partner in a firm, and who, by virtue of his ostensible connection with it, is liable for the obligations of the firm.

Notary Public: A public officer authorized by law to make official records and to administer oaths.

Offeree: One to whom an offer is made.

Offeror: One who makes an offer.

Ordinances: Laws passed by City Councils.

Parole Contract: Any contract, whether oral or written, which is not under seal.

Partnership: A relation existing between individuals who are conducting business jointly, and which fastens upon each certain legal responsibilities.

Partnership Associations: Partnerships in which the liability of members for firm debts is limited to the amount of their investment.

Payee: One to whom money is to be paid according to contract.

Per se: In itself.

Personal Property: Any tangible object not permanently attached to land. In general, movable goods.

Plaintiff: One who inaugurates a suit at law.

Possession: The physical control of property.

Power of Attorney: An instrument under seal designating a person as agent and describing his authority.

Precedent: A ruling of a court in an individual dispute, which becomes a model for future controversies of kindred nature.

Principal: One who invests a second person with authority to act as agent for him.

Promisee: One to whom a promise is made.

Promisor: One who makes a promise.

Promissory Note: A written promise to pay a certain sum of money at a future time, unconditionally.

Protest: A certification by a notary public that a bill or note has been refused payment at maturity.

Proxy: One who is given the power to vote in place of another.

Public Policy: The general rules and spirit of the law.

Ratification: Approving something done without authority by another.

Real Property: Land and its appurtenances.

Resident: One who lives permanently in a certain place.

Sale: The transfer of ownership in property for a price in money.

Sanction: The consequences entailed by a breach of positive law.

Seal: An impression upon wax, or a scroll, placed after the signature of a contract or deed, to give it added solemnity.

Simple Contract: Any contract, whether oral or written, which is not under seal.

Special Partner: One who invests capital in a partnership and is liable for its debts only to the extent of his investment.

Specific Performance: The actual performance of a contract by the party bound to fulfil it.

Statute Law: Law enacted by legislative bodies.

Statute of Frauds: A law providing that the evidence of certain contracts shall be in writing.

Statute of Limitations: A statute providing that no suits at law can be had upon certain transactions after the expiration of a specified number of years from the time of their occurrence.

Statutes: Enactments of legislative bodies.

Stockholder: One who owns a certain interest in a corporation, which is represented by a share of stock.

Stoppage in Transitu: Right of a consignor to recover possession of goods from a carrier before they have reached the end of their journey, provided the consignee has become insolvent.

Surety: An engagement to undertake the duties of another on the failure of the latter to perform them.

Tender: An offer of payment.

Testator: A person who makes a will.

Tort: An infringement of private rights.

Transferee: One to whom the title of personal property is passed.

Transferor: One who transfers title to personal property.

Trustee: One who holds and employs property for the benefit of others.

Ultra vires: Beyond the powers.

Vendee: One to whom something has been sold.

Vendor: One who sells.

Void : Of no force whatever.

Voidable : Capable of becoming void or valid according to subsequent events.

Voting Trust : A limited number of individuals to whom the voting power of one or more corporations is entrusted.

Waiver : A renunciation of rights.

Ward : One whose person or property, or both, has, on account of some disability, — minority, lunacy, feeble-mindedness, — been placed in the charge of another person.

Warranty : An agreement that articles sold shall possess certain characteristics.



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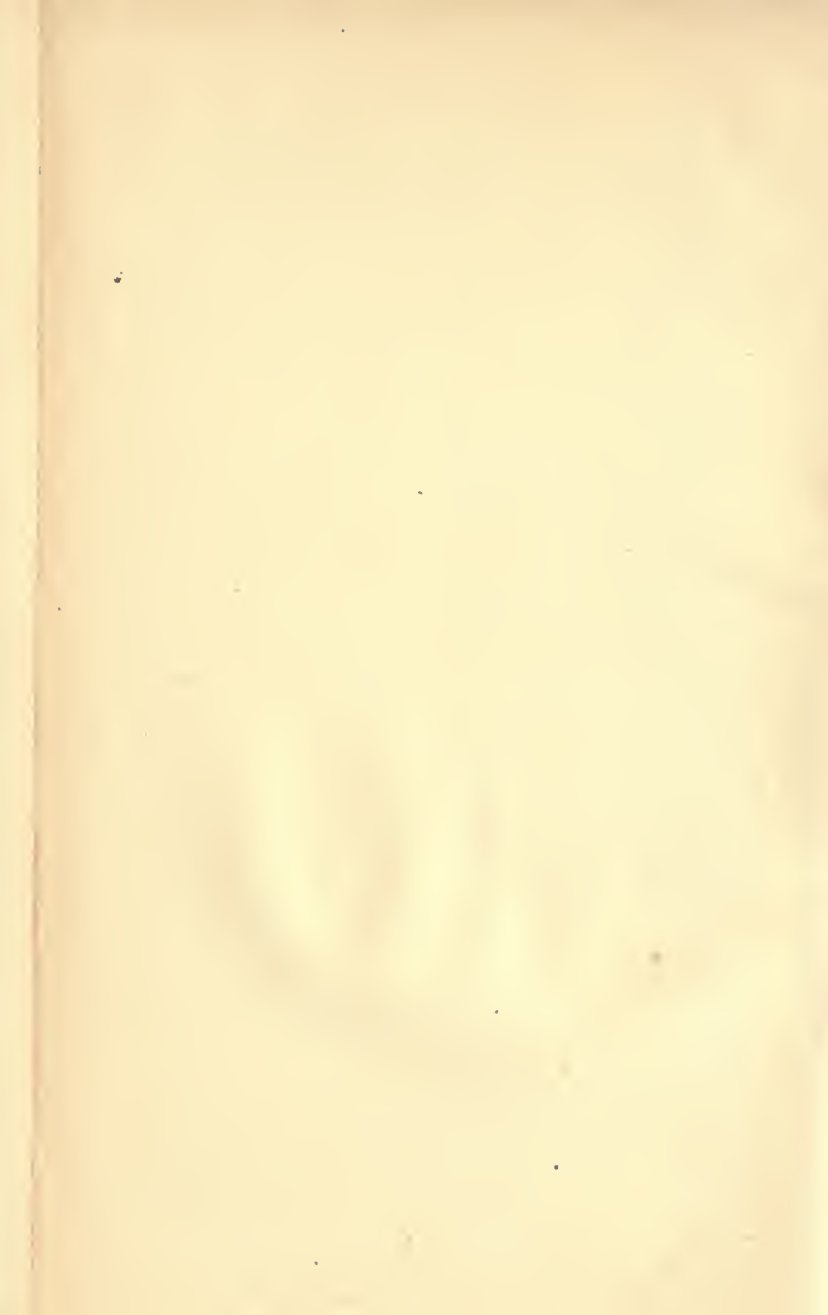
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